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Products Liability: User Misconduct Defenses

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PRODUCTS LIABILITY: USER MISCONDUCT DEFENSES

DAVID G. OWEN*

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When a person is injured while using a product, the accident may be attributable to some defect in the product. But even if a product is defective in some respect, most product accidents are caused more by the consumer's risky behavior in using the product than by the product's defective condition. In the estimation of a former chairman of the Consumer Product Safety Commission, "over 2/3 of all injuries related to consumer products have nothing to do with the design or the performance of the product. They relate to the misuse or abuse of the product."¹ If a product accident is caused in whole or in part by a user's behavior that was by some measure improper, or that was informed and voluntary, the manufacturer or other seller of a defective (or misrepresented) product may avoid responsibility for some or all of the resulting damages. An improper or deliberately risky use of a product which results in injury to the user often gives rise to one or more of the traditional conduct (or "misconduct")² defenses,³ the subject of this Article.⁴

This Article examines the nature and effect of the traditional defenses arising out of the plaintiff's misconduct, largely separate from the doctrine of comparative fault which is treated in detail elsewhere.⁵ First considered are the traditional user misconduct defenses—contributory negligence, assumption of

1. Mary Fisk, *An Interview with John Byington*, 14 TRIAL, Feb. 1978, at 25, 25.

2. User conduct defenses normally involve "misconduct" in the sense of the user's failure to conform to some standard of proper behavior. Although the conventional definitions of product misuse and assumption of risk do not require a formal showing that the conduct was "improper," the type of behavior that qualifies for both defenses ordinarily may be fairly characterized as "misconduct." Accordingly, the terms "user conduct" and "user misconduct" are interchanged throughout this Article.

3. See generally David G. Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267 (1968); Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

4. A user's conduct which results in injury to a third party may raise an issue of superseding causation, a topic which is outside the scope of this Article.

5. The doctrine of comparative fault, an approach to plaintiff misconduct which cuts a broad swathe across the law of torts and products liability, is examined fully elsewhere. See generally 2 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY ch. 15 (forthcoming 2000) [hereinafter 2 MADDEN & OWEN ON PRODUCTS LIABILITY]; VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 11-1 to -8 (3d ed. 1994); HENRY WOODS & BETH DEERE, COMPARATIVE FAULT §§ 14:42-148 (3d ed. 1996).

risk, and product misuse. After an overview of these defenses in Part I, contributory negligence is fully examined in Part II, assumption of risk in Part III, and product misuse in Part IV. Misconduct defenses applicable to warranty claims are considered in Part V, and those applicable to misrepresentation claims are treated in Part VI. Because user misconduct in some form figures prominently in a large proportion of products liability cases, this Article concludes that a thorough understanding of the user misconduct defenses is essential to lawyers litigating such cases.

I. TRADITIONAL USER MISCONDUCT DEFENSES: AN OVERVIEW

A. *Common Law*

The classic misconduct defenses to products liability negligence claims have always been contributory negligence⁶ and assumption of risk.⁷ With the advent of the modern doctrine of strict products liability in tort during the 1960s and 1970s,⁸ most jurisdictions added the new defense⁹ of product "misuse."¹⁰ While contributory negligence has remained the basic defense to products liability claims grounded in negligence, most jurisdictions in the latter part of the twentieth century renamed the doctrine "comparative negligence," or "comparative fault," and changed its effect from barring a plaintiff's claim altogether to reducing the plaintiff's damages proportionate to his or her fault. In addition to defining the role of contributory negligence in most jurisdictions, comparative fault principles now to a large extent control the effect of assumption of risk in many jurisdictions, and product misuse in a few jurisdictions, as discussed below. Nevertheless, the traditional user misconduct defenses still apply to products liability claims in the handful of states that continue to reject the doctrine of comparative fault.¹¹ Moreover, much of the traditional doctrine surrounding contributory negligence, assumption of risk, and product misuse has survived the conversion to comparative fault even

6. See *infra* Part II.

7. See *infra* Part III.

8. See 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 5.1 (3d ed. 2000) [hereinafter 1 MADDEN & OWEN ON PRODUCTS LIABILITY].

9. In many jurisdictions, product misuse is technically not a "defense" in the sense of an affirmative defense, but its absence is instead considered part of a plaintiff's *prima facie* case. In such jurisdictions, the role of misuse in products liability law may be viewed more in the nature of a limitation on defectiveness than a true defense. From whatever perspective, when a user "misuses" a defective product, his or her misconduct may operate as a bar to liability similar to the operation of the traditional defenses of contributory negligence and assumption of risk. For that reason, together with the fact that a number of state reform acts treat product misuse as an affirmative defense, this Article covers the doctrine of misuse with other misconduct "defenses."

10. See *infra* Part IV.

11. As of 2000, the comparative fault doctrine is still rejected in Maryland, the District of Columbia, Virginia, North Carolina, and Alabama. In early 2000, a Maryland Senate committee voted 7-2 to kill a bill that would have replaced that state's contributory negligence doctrine with a comparative fault rule. See *Maryland Legislators Vote to Keep Contributory Negligence*, LIAB. & INS. WK., March 6, 2000, at 5.

though the conventional defenses now often operate to reduce, rather than to bar altogether, a plaintiff's damages recovery.¹²

Although courts in comparative fault jurisdictions generally apply damages-apportioning principles to a plaintiff's contributory negligence, both contributory negligence and assumption of risk remain as *total* bars to recovery in most jurisdictions if the plaintiff's fault equals or, in some states, exceeds the fault of the defendant.¹³ In addition, while some courts after the adoption of comparative fault abolished assumption of risk as a separate doctrine, or merged it into the comparative fault scheme, other courts refuse to apply comparative fault principles to assumption of risk or do so only to a limited extent.¹⁴ Further, in the many jurisdictions that consider the absence of misuse to be an element of the *prima facie* case of strict liability in tort,¹⁵ a finding of misuse should be entirely unaffected by the doctrine of comparative fault. Similarly, with claims for breach of warranty¹⁶ and misrepresentation,¹⁷ the respective issues of justifiable reliance, proximate cause, and scope of warranty implicated by a user's conduct are part of a plaintiff's case in chief which, if not established, will destroy such claims before they ever arise. In short, the traditional plaintiff misconduct defenses often still operate in their conventional form as a total bar to liability.

When a plaintiff acts carelessly or adventurously in a manner that causes or contributes to a product accident, the conduct may give rise to two or all three traditional misconduct defenses.¹⁸ So, if a plaintiff proceeds to ignite a

12. See, e.g., *Hernandez v. Barbo Mach. Co.*, 957 P.2d 147 (Or. 1998) (holding that plaintiff, found 50.5% at fault, entitled to instruction that his failure to discover or guard against existence of defect could not be considered comparative fault for strict products liability claim); *accord* *Busch v. Busch Const., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977) ("[A] consumer's negligent failure to inspect a product or to guard against defects is not a defense and thus may not be compared with a distributor's strict liability.")

As with contributory negligence, see *infra* Part II, some courts have ruled that a plaintiff's fault may be the sole proximate cause of an accident even in a comparative fault jurisdiction. See *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891 (5th Cir. 1980) (2-1 decision) (applying Florida law and finding that plaintiff's misconduct may serve as sole proximate cause even in comparative fault regime, where pilot attempted to take off without removing gust lock pin from steering control column); *States v. R.D. Werner Co.*, 799 P.2d 427, 430 (Colo. Ct. App. 1990) (holding that unlike comparative negligence, which diminishes recovery, unforeseeable misuse of ladder from which plaintiff fell goes to causation and completely bars recovery, regardless of defective condition); *Bowling v. Heil Co.*, 511 N.E.2d 373, 377 (Ohio 1987) (noting that unreasonable assumption of risk remains absolute defense to actions based on strict liability in tort); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 423 (Tex. 1984) (noting that assumption of risk remains total bar to liability notwithstanding adoption of comparative fault), *rev'd on other grounds*, *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439 (Tex. 1984).

13. See, e.g., *King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W. Va. 1989) (holding that assumption of risk remains total bar if plaintiff's fault equals or exceeds fault of other parties). See generally 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 15.

14. In Ohio, for example, assumption of risk has been merged into the comparative fault scheme for negligence claims but remains as a total bar for claims brought in strict liability in tort. See *Bowling*, 511 N.E.2d at 377; *Onderko v. Richmond Mfg. Co.*, 511 N.E.2d 388, 392 (Ohio 1987).

15. See *infra* Part IV.C.

16. See *infra* Part V.

17. See *infra* Part VI.

18. See, e.g., *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 357 (Md. 1985) ("A plaintiff in a products liability case may plead alternative causes of action, and if the plaintiff alleges negligence in addition to strict liability, a defendant may be entitled to instructions on contributory negligence, assumption of risk, and misuse.")

pilot light, knowing of a leaking gas valve;¹⁹ attempts to mount a tire, expressly contrary to a warning, on a wheel rim of a different size;²⁰ falls as a stunt 323 feet onto a cushion rated for 200 feet;²¹ or locks herself into a car's trunk, which has no internal release device, in an attempt to commit suicide,²² a defendant may assert and sometimes successfully defend the case on the basis of some combination of contributory (or comparative) negligence, assumption of risk, and misuse. Thus, subject to applicable principles of comparative fault, a practitioner representing a defendant seller in a case involving plaintiff misconduct should almost always consider the possible availability of two or all three traditional misconduct defenses.²³

The three plaintiff misconduct defenses are fundamental mechanisms by which the law defines the boundaries of liability by allowing manufacturers to avoid responsibility for certain types of product accidents. Accordingly, trial courts have an important obligation to admit appropriate evidence, permit appropriate argument, and submit appropriate instructions to the jury on any misconduct defenses that fairly may be raised in a particular case.²⁴

B. Reform Legislation

Many states have enacted products liability "reform" statutes that specifically address the definition, scope, and effect of various defenses based on a plaintiff's conduct. Such statutes variously reduce damages or bar recovery if a product accident is caused by a plaintiff's unreasonable behavior or contributory fault, assumption of risk, misuse of the product, or sometimes specifically designated types of plaintiff misbehavior.²⁵ Moreover, comparative fault statutes in many states address plaintiff misconduct in general terms, and some such statutes include provisions on the role of a plaintiff's conduct in products liability claims, particularly when the misconduct involves product misuse.²⁶

19. *Freislinger v. Emro Propane Co.*, 99 F.3d 1412 (7th Cir. 1996) (applying Illinois law and discussing contributory/comparative negligence and assumption of risk).

20. *Uniroyal Goodrich Tire Co. v. Hall*, 681 So. 2d 126 (Ala. 1996) (discussing contributory negligence, assumption of risk, and misuse).

21. *Bakunas v. Life Pack, Inc.*, 531 F. Supp. 89 (E.D. La. 1982), *aff'd*, 701 F.2d 946 (5th Cir. 1983) (applying assumption of risk and misuse).

22. *Daniell v. Ford Motor Co.*, 581 F. Supp. 728, 730-31 (D.N.M. 1984) (examining misuse, and possibly assumption of risk and comparative fault).

23. This assumes that the complaint includes claims in both negligence and strict liability because, as discussed below, misuse is more typically viewed as a strict liability defense and ordinary contributory negligence is not a defense at all to strict liability in tort.

24. In *Freislinger*, 99 F.3d 1412, the trial court failed to allow the jury to consider certain allegations of contributory negligence asserted by defendants:

In spite of the fact that district courts have substantial discretion in determining whether the evidence at trial warrants submitting theories to the jury, we are disturbed by the court's placing such tight shackles on the jury's ability to consider specific allegations of contributory negligence.

Id. at 1418. The court remanded the case for a new trial "because of the court's decision to exclude certain theories of contributory negligence that were supported by the evidence." *Id.*

25. *See, e.g.*, WASH. REV. CODE ANN. § 5.40.060 (West 1995) (permitting drug or alcohol intoxication to be a complete defense in some cases).

26. *See, e.g.*, WYO. STAT. ANN. § 1-1-109(a)(iv) (Michie 1999) (defining "fault" to include "acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product . . ."). *See generally* SCHWARTZ, *supra* note 5, §§ 11-1 to -8 (discussing strict

For example, one statutory provision in Connecticut specifies that contributory negligence shall merely diminish damages rather than bar liability;²⁷ another specifies that neither contributory nor comparative negligence shall bar liability in strict products liability in tort claims but recognizes the separate defenses of “misuse of the product” and “knowingly using the product in a defective condition.”²⁸ Statutes in Arizona²⁹ and North Carolina³⁰ provide a defense for the use of products contrary to their “express and adequate instructions or warnings . . . if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings.”³¹ Kentucky enacted a contributory negligence defense to products liability actions in 1978³² but superseded it with a comparative fault act in 1988.³³ A number of products liability reform statutes provide that a plaintiff’s damages shall be reduced,³⁴ or that recovery shall be barred altogether,³⁵ if a

liability and comparative fault); WOODS & DEERE, *supra* note 5, §§ 14:25-48 (discussing defenses to strict liability in tort).

27. CONN. GEN. STAT. ANN. § 52-572h(b) (West 1991 & Supp. 2000).

28. CONN. GEN. STAT. ANN. § 52-572l (West 1991 & Supp. 2000).

29. See ARIZ. REV. STAT. ANN. § 12-683(3) (West 1992). The Arizona statute provides that a products liability defendant shall not be liable if the defendant proves:

The proximate cause of the incident giving rise to the action was a use or consumption of the product which was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable or was contrary to any express and adequate instructions or warnings appearing on or attached to the product or on its original container or wrapping, if the injured person knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings.

Id.

30. See N.C. GEN. STAT. § 99B-4(1) (1999).

31. *Id.*

32. See KY. REV. STAT. ANN. § 411.320 (Michie 1992). See generally *Reda Pump Co. v. Finck*, 713 S.W.2d 818 (Ky. 1986) (holding statute constitutional), *superseded by statute as stated in*, *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924, 930 (Ky. Ct. App. 1989).

33. See KY. REV. STAT. ANN. § 411.182 (Michie 1992); see also *Caterpillar, Inc. v. Brock*, 915 S.W.2d 751, 753 (Ky. 1996).

34. One source lists Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, New York, North Dakota, Utah, and Washington as being strict liability states which provide statutorily that assumption of risk merely reduces a plaintiff’s recovery rather than serving as a total bar. WOODS & DEERE, *supra* NOTE 5, § 6:11, at 146-47. Examples of such legislation include the following:

Idaho: IDAHO CODE § 6-1305(2)(a) (Michie 1998) states:

When the product seller proves, by a preponderance of the evidence, that the claimant knew about the product’s defective condition, and voluntarily used the product or voluntarily assumed the risk of harm from the product, the claimant’s damages shall be subject to reduction to the extent that the claimant did not act as an ordinary reasonably prudent person under the circumstances.

Missouri: MO. STAT. ANN. § 537.765(3)(3) (West 2000) provides damages subject to reduction according to pure comparative fault if plaintiff used the product “with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger.”

Montana: MONT. CODE ANN. § 27-1-719(5)(a) & (6) (1999) provide that comparative fault applies if “[t]he user or consumer of the product discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it.”

35. States that have enacted such legislation include:

Connecticut: CONN. GEN. STAT. ANN. § 52-572l (West 1991) retains assumption of risk and misuse defenses for products liability claims based on strict liability in tort.

Indiana: IND. CODE ANN. § 34-20-6-3 (Michie 1998) makes a defense available if the user or consumer “(1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.”

plaintiff voluntarily—sometimes voluntarily *and unreasonably*³⁶—encounters a known (or obvious)³⁷ product danger. Products liability statutes in several states reduce damages³⁸ or bar liability³⁹ when a plaintiff's use of a product is

Michigan: MICH. COMP. LAWS ANN. § 600.2947(3) (West 2000) states:

A manufacturer or seller is not liable in a product liability action if the purchaser or user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk and the risk that he or she exposed himself or herself to was the proximate cause of the injury. This subsection does not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.

Mississippi: MISS. CODE ANN. § 11-1-63(d) (Supp. 1999) states:

In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

North Carolina: N.C. GEN. STAT. § 99B-4(2) (1999) provides that no manufacturer or seller is liable if the "user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product."

South Carolina: S.C. CODE ANN. § 15-73-20 (Law. Co-op. 1976) states "[i]f the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

36. At least Missouri, North Carolina, and South Carolina define the assumption of risk defense in terms of encounters with dangers which are known or voluntary and *unreasonable*. See MO. STAT. ANN. § 537.765.3(3) (West 2000); N.C. GEN. STAT. § 99B-4(2) (1999); S.C. CODE ANN. § 15-73-20 (Law. Co-op. 1976).

37. Mississippi and Montana both allow a defense in cases of encounters with obvious, as well as known, risks. See MONT. CODE ANN. § 27-1-719(5)(a) (West 2000) (allowing defense if "[t]he user or consumer discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it"). Compare MISS. CODE ANN. § 11-1-63(d) (Supp. 1999) (assumed risks) with MISS. CODE ANN. § 11-1-63(e) (Supp. 1999) (danger is "known or is open and obvious").

38. At least Idaho and Missouri have enacted such legislation. See IDAHO CODE § 6-1305(3) (Michie 1998) (providing that misuse reduces the claimant's damages according to comparative responsibility and defining "misuse" as "when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances"); MO. STAT. ANN. § 537.765.3 (West 2000) (providing that, for purposes of apportionment, a plaintiff's "fault" includes product use that is (1) not reasonably anticipated or (2) not intended by the manufacturer).

39. At least the following states have such provisions:

Arizona: ARIZ. REV. STAT. ANN. § 12-683(3) (West 1992) states:

The proximate cause of the incident giving rise to the action was a use or consumption of the product which was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable or was contrary to any express and adequate instructions or warnings appearing on or attached to the product or on its original container or wrapping, if the injured person knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings.

Indiana: IND. CODE ANN. § 34-20-6-4 (Michie 1998) states:

It is a defense to an action under this article (or IC 33-1-1.5 before its repeal) that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

Michigan: MICH. COMP. LAWS ANN. § 600.2947(2) (West 2000) provides no liability for harm caused by misuse unless the misuse is "reasonably foreseeable" which is a legal issue for the court.

Tennessee: TENN. CODE ANN. § 29-28-108 (Michie 2000) provides no liability for dangers

abnormal or unforeseeable, generally referred to in the statutes as product "misuse."⁴⁰

Finally, most of the reform legislation mentioned above specifically addresses products liability litigation. Some state statutes abolish the defense of assumption of risk as a general proposition, not restricted to the products liability context,⁴¹ and most states have enacted legislation which broadly applies comparative fault principles to the doctrines of contributory negligence, assumption of risk, and often product misuse.⁴² Although only a couple of states⁴³ have adopted the Uniform Comparative Fault Act,⁴⁴ the Act broadly addresses the effect of plaintiff misconduct in claims brought in negligence, warranty, and strict liability in tort. For purposes of apportionment, the Act provides that "fault" includes unreasonable assumption of risk and "misuse of a product for which the defendant would otherwise be liable," in addition to more conventional contributory negligence.⁴⁵ The Act's misuse provision means that a claimant's damages should be reduced if they result in part from the claimant's *foreseeable* misuse, but not for the claimant's *unforeseeable* misuse which remains as a total bar.⁴⁶

resulting from "unforeseeable alteration, change, improper maintenance or abnormal use."

40. The Montana statute defines the conduct in terms of *unreasonable* misuse. MONT. CODE ANN. § 27-1-719(5)(b) (1999).

41. At least Connecticut, Massachusetts, and Oregon have abolished the defense of assumption of risk legislatively. See CONN. GEN. STAT. ANN. § 52-572h (West 1991 & Supp. 1999) (abolishing defense in negligence actions only, but retaining defense in strict products liability in tort actions: § 52-572h); MASS. GEN. LAWS ANN. ch. 231 § 85 (West 2000) ("The defense of assumption of risk is hereby abolished in all actions hereunder."); OR. REV. STAT. § 18.475(2) (1988) ("The doctrine of implied assumption of risk is abolished.").

42. The statutory provisions vary widely. See, e.g., ALASKA STAT. § 09.17.900 (Michie 1998) (defining "fault" to include "misuse of a product for which the defendant otherwise would be liable"); ARK. CODE ANN. § 16-64-122(c) (Michie 1987) ("The word 'fault' as used in this section includes any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party."); IOWA CODE ANN. § 668.1 (West 1998) (stating that "fault" means "one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability" and that fault "also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages"); WYO. STAT. ANN. § 1-1-109(a)(iv) (Michie 1999) ("'Fault' includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product.").

43. These states are Iowa and Washington.

44. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 123 (1996). On the Act generally, see John W. Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J.L. REFORM 220 (1977). Dean Wade was chairman of the NCCUSL committee responsible for drafting the Act.

45. UNIF. COMPARATIVE FAULT ACT § 1, 12 U.L.A. 123 (1996).

46. *Id.* cmt. b.

II. CONTRIBUTORY NEGLIGENCE

A. In General

Contributory negligence is the classic common-law defense⁴⁷ to products liability negligence claims.⁴⁸ Although most courts considerably restrict the availability of this defense in strict liability in tort claims, as discussed below, they widely apply ordinary contributory negligence principles to products liability claims brought in negligence.⁴⁹ Thus, in the products liability context as in others, contributory negligence is defined as conduct of a plaintiff which falls below the standard of reasonable behavior required for a person's own protection which proximately contributes, together with a defendant's negligence or other breach of duty, to the person's harm.⁵⁰

Contributory negligence operates in much the same manner in products liability cases as in other types of negligence cases. So, if comparative fault principles do not dictate to the contrary, a finding that a plaintiff was contributorily negligent bars the plaintiff altogether from recovering damages from a negligent defendant.⁵¹ Thus, a plaintiff found to have been contributorily negligent in an encounter with a dangerously defective product may not recover from the manufacturer or other seller for negligently making or supplying the product in such a condition.⁵² However, if the defendant's misconduct is not merely negligent but rises to the level of reckless, willful, or wanton misbehavior, a plaintiff's recovery will not be barred by contributory negligence, although it will be barred by contributory recklessness.⁵³

Contributory negligence operates as a total bar to liability not only in those few jurisdictions that have not adopted comparative fault,⁵⁴ but also in certain

47. While contributory negligence is a common law doctrine, comparative fault legislation and products liability reform legislation in many states govern the effect of various forms of user misconduct. See *supra* Part II.

48. See generally Noel, *supra* note 3, at 105-19 (discussing effect of contributory negligence as a defense in strict product liability); Epstein, *supra* note 3, at 270-73 (discussing traditional notion of contributory negligence and its continuing role).

49. See, e.g., Reed v. Carlyle & Martin, Inc., 202 S.E.2d 874 (Va. 1974); see also Duke v. Am. Olean Tile Co., 400 N.W.2d 677 (Mich. Ct. App. 1986) (holding, in slip-and-fall action against manufacturer of quarry tile used for flooring in fast food restaurant, that jury could find that plaintiff was walking unreasonably fast).

50. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 65, at 451 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

51. *Id.* at 461 ("[I]n the absence of modifying legislation or judicial action, contributory negligence of the plaintiff is a complete bar to his action for any common law negligence of the defendant." (footnotes omitted)); see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 102, at 670 (4th ed. 1971) ("There is no doubt that where the plaintiff's action is founded on negligence, his contributory negligence will bar his recovery to the same extent as in any other negligence case.").

52. See, e.g., Nicholson v. Am. Safety Util. Corp., 488 S.E.2d 240, 244 (N.C. 1997) ("[C]ontributory negligence in the context of a products liability action operates as a bar to recovery in the same manner as in an ordinary negligence action.").

53. See, e.g., Koske v. Townsend Eng'g Co., 526 N.E.2d 985 (Ind. Ct. App. 1988) (stating that a claimant's recklessness will bar recovery even against a reckless manufacturer), adopted in part and vacated in part on other grounds, 551 N.E.2d 437 (Ind. 1990); see RESTATEMENT (SECOND) OF TORTS § 482 (1965); David G. Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769, 787-88 (1977).

54. These jurisdictions include Alabama, the District of Columbia, Maryland, North Carolina, and Virginia. SCHWARTZ, *supra* note 5, §1-5 (e)(3).

cases in most other jurisdictions as well. Except for the thirteen states that presently have a system of *pure* comparative fault,⁵⁵ most states apply the principles of comparative fault only when a plaintiff's fault was less than (or equal to) the fault of the defendant or defendants. In jurisdictions following such a modified ("50%") approach to comparative negligence, if a plaintiff's fault was greater than (or equal to) that of the defendant(s), the contributory negligence doctrine applies in its conventional form by barring recovery altogether.⁵⁶ Thus, the doctrine of contributory negligence remains an important doctrine in modern products liability litigation.

The complex interrelationships between the human brain, the human body, and the myriad different products encountered daily at home and at work result in a vast universe of ways in which user carelessness may result in injury. Consumers may be contributorily negligent in using products for an unreasonably dangerous purpose, such as using a lawnmower to cut a hedge, but the usual form of contributory negligence involves using a product in an unreasonably dangerous manner, as in driving an automobile at excessive speed⁵⁷ or in an intoxicated condition;⁵⁸ reaching into a trash compactor knowing that its door cables are broken;⁵⁹ failing to release one's hold of a piece of meat when pushing it into the revolving blade of a meat slicing machine;⁶⁰ standing on a slippery substance dangerously close to the exposed moving parts of a machine;⁶¹ operating a spray-painting machine without using an available mask;⁶² failing to wear rubber gloves, contrary to label instructions, and splattering a caustic substance on one's hand;⁶³ failing properly to engage a car's transmission in the "park" position;⁶⁴ improperly using a condom;⁶⁵ walking too fast on a slippery floor;⁶⁶ or carelessly lighting a cigarette with a

55. The present list of such states includes Alaska, California, Colorado (pure approach applicable to products liability actions only under COLO. REV. STAT. § 13-21-406 (2000)), Florida, Kentucky, Louisiana, Michigan (partially amended to a modified 50% approach in 1996 under MICH. COMP. LAWS ANN. § 600.2959 (West 2000)), Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington (except cases involving drug or alcohol influence under WASH. REV. CODE ANN. § 5.40.060 (West 1995)). See SCHWARTZ, *supra* note 5, § 2-1(a); WOODS & DEERE, *supra* note 5, § 4:2. A few other states in which the courts adopted pure comparative fault subsequently switched over legislatively to a 50% system. See SCHWARTZ, *supra* note 5, § 2-1(b)(3).

56. See PROSSER & KEETON ON TORTS, *supra* note 50, § 67, at 473.

57. Hoelter v. Mohawk Serv., Inc., 365 A.2d 1064 (Conn. 1976).

58. Hill v. Gen. Motors Corp., No. 98-1433, 1998 WL 911699 (4th Cir. Dec. 31, 1998) (applying North Carolina law).

59. Sears v. Waste Processing Equip., Inc., 695 So. 2d 51 (Ala. Civ. App. 1997).

60. Koske v. Townsend Eng'g Co., 526 N.E.2d 985 (Ind. Ct. App. 1988), *adopted in part and vacated in part on other grounds*, 551 N.E.2d 437 (Ind. 1990).

61. Reed v. Carlyle & Martin, Inc., 202 S.E.2d 874 (Va. 1974).

62. Parris v. M.A. Bruder & Sons, Inc., 261 F. Supp. 406 (E.D. Pa. 1966).

63. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984) (granting defendant's motion for summary judgment pursuant to statutory provision barring recovery for use of product contrary to instructions).

64. Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 594 (Tex. 1999) ("Regardless of any danger of a mis-shift, a driver has a duty to take reasonable precautions to secure his vehicle before getting out of it."); Ray v. Ford Motor Co., 514 S.E.2d 227 (Ga. Ct. App. 1999); cf. Ford Motor Co. v. Bartholomew, 297 S.E.2d 675 (Va. 1982) (upholding jury's finding of no contributory negligence where gear shift lever, not fully engaged in park, slipped into reverse with motor running).

65. J.P.M. v. Schmid Lab., Inc., 428 A.2d 515 (N.J. Super. Ct. App. Div. 1981).

66. Duke v. Am. Olean Tile Co., 400 N.W.2d 677 (Mich. Ct. App. 1986) (regarding slip-and-fall action against manufacturer of quarry tile used for flooring in fast food restaurant).

disposable lighter near one's "big hair" bouffant hairdo held in place with excessive hair spray, the fumes of which ignite.⁶⁷

As is true with negligence claims in general, the issues of contributory negligence are peculiarly grounded in community norms of properly safe behavior in particular circumstances, so that the issue of whether a plaintiff's behavior should be classified as unreasonable is inherently a question of fact especially suited to resolution by a jury.⁶⁸ Yet if a plaintiff's behavior is so evidently reasonable or unreasonable that no reasonable jury could find to the contrary, a court may rule on contributory negligence as a matter of law.⁶⁹

Whereas negligence is defined as the failure to exercise due care toward others, contributory negligence is the failure to exercise due care toward oneself. In most respects, however, contributory negligence is the mirror image of negligence. While theorists may debate whether people properly may be said to have a "duty" to act with reasonable care to protect themselves,⁷⁰ the courts are in quite general agreement that the classic elements of negligence⁷¹—duty,⁷²

67. *McClure v. Wilkinson Sword Consumer Prod., Inc.*, (Ill. Cir. Ct.), 23 Prod. Safety & Liab. Rep. (BNA) 394 (Apr. 14, 1995).

68. *See, e.g., Nicholson v. Am. Safety Util. Corp.*, 488 S.E.2d 240, 244 (N.C. 1997) ("Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment.")

69. *Id.* ("Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted."). *See, e.g., Hill v. Gen. Motors Corp.*, No. 98-1433, 1998 WL 911699 (4th Cir. Dec. 31, 1998) (applying North Carolina law and affirming summary judgment for defendant); *Sears v. Waste Processing Equip., Inc.*, 695 So. 2d 51 (Ala. Civ. App. 1997) (affirming summary judgment in defendant's favor).

70. Dean Prosser and other scholars have questioned whether the doctrine of contributory negligence fairly may be said to embrace the notion of a duty. *See, e.g., PROSSER & KEETON ON TORTS*, *supra* note 50, § 65, at 453 ("Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty, unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of the plaintiff's own negligence." (footnotes omitted)). Yet, Immanuel Kant believed that the supreme principle of morality (the categorical imperative) included a respect for oneself: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only." IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 47 (Lewis W. Beck trans., 1959) (1785). However, Kant believed that one's duty to oneself transcended the law: "My duty toward myself cannot be treated juridically; the law touches only our relations with other men; I have no legal obligations towards myself" Immanuel Kant, *Duties to Oneself*, in *LECTURES ON ETHICS* 117 (L. Infield trans., 1978) (1930), *quoted in* J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. New-Kantians*, 87 COLUM. L. REV. 433, 433 (1987). *See generally* Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 461, 469 (David G. Owen ed., 1995) (observing that under current legal doctrine, "the formal criteria defining plaintiff's negligence and defendant's negligence are essentially the same").

71. *See* 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 2.1.

72. *See, e.g., Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728-29 (9th Cir. 1986) (applying Hawaii law and asserting notion of duty).

breach,⁷³ cause in fact,⁷⁴ proximate cause,⁷⁵ and damage⁷⁶—comprise the defense of contributory negligence as well.

A plaintiff will be contributorily negligent if he or she “fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury”⁷⁷ or simply “fails to use reasonable care with regard to [a] product.”⁷⁸ Contributory negligence in the products liability setting has been particularized to include the use of a product contrary to adequate warnings and instructions, the unreasonable use of a product known to be defective, or the use of a product in an unreasonable manner.⁷⁹ In short, persons have a duty to exercise reasonable care in using products to avoid injuries to themselves.

73. PROSSER & KEETON ON TORTS, *supra* note 50, § 65, at 453-54 (footnotes omitted) provides:

The plaintiff is required to conform to the same objective standard of conduct, that of the reasonable person of ordinary prudence under like circumstances. The unreasonableness of the risks which he incurs is judged by the same process of weighing the importance of the interest he is seeking to advance, and the burden of taking precautions, against the probability and probable gravity of the anticipated harm to himself.

74. “The ordinary negligence principles of cause in fact apply with equal force to contributory negligence.” *Id.* at 456. *See also* RESTATEMENT (SECOND) OF TORTS § 465(2) (1965).

75. For example the court in *Jenkins*, 785 F.2d at 729 stated:

Proximate cause is lacking because the alleged [contributory] negligence . . . has no connection with the actual injury. The acts asserted, however much they may have increased the risk of injury [from another source], had absolutely no relation to the risk that actually matured The duty breached by the alleged [contributory] negligence did not encompass the hazard that actually came about, and any such negligence is therefore irrelevant to the issue of proximate cause.

See also RESTATEMENT (SECOND) OF TORTS § 468 (1965).

76. On actual damages, *see* 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 17.

77. *Nicholson v. Am. Safety Util. Corp.*, 488 S.E.2d 240, 244 (N.C. 1997) (emphasis omitted) (quoting *Newton v. New Hanover County Bd. of Educ.*, 467 S.E.2d 58, 65 (N.C. 1996)). *See also* *Egelhoff v. Holt*, 875 S.W.2d 543, 547-48 (Mo. 1994) (en banc) (quoting comparative fault statute, MO. STAT. ANN. § 537.765.3(5) (West 2000), which defines “fault” in part as a “failure to undertake the precautions a reasonably careful user of the product would take”).

78. *Uniroyal Goodrich Tire Co. v. Hall*, 681 So. 2d 126, 129 (Ala. 1996); *see also* *Williams v. Delta Int’l Mach. Corp.*, 619 So. 2d 1330, 1332 (Ala. 1993) (clarifying case law regarding failure to exercise reasonable care in using the product).

79. Section 99 B-4 of the North Carolina Code describes the form of conduct that may establish contributory negligence in the products liability context:

No manufacturer or seller shall be held liable in any product liability action if:

(1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; or

(2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; or

(3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage complained of.

N.C. GEN. STAT. § 99B-4 (1999); *see also* *Nicholson v. Am. Safety Util. Corp.*, 488 S.E.2d 240, 243 (N.C. 1997) (discussing N.C. GEN. STAT. § 99B-4 (1989)).

Although courts rarely examine the notion of contributory negligence explicitly in terms of the Hand formula, by which $B < P \times L$ implies an actor's negligence, this classic "calculus of risk" approach to ascertaining negligence applies as well to contributory negligence.⁸⁰ Thus, the reasonableness of a plaintiff's exposure of himself to a product hazard is to be ascertained by weighing the burden of avoiding the dangerous conduct on the one hand, against the likelihood and severity of a foreseeably harmful result on the other. If the burden of avoiding a risk is large, as in shutting down a machine that takes hours to restart,⁸¹ or very great, such as the possible loss of employment if a worker refuses to engage in a dangerous task as directed by a superior, then an exposure to the risk for such reasons is more likely to be reasonable under the circumstances.⁸²

On the other hand, a user's act is more likely to be contributorily negligent if a significant risk may be avoided by a relatively small degree of effort or attention. Contributory negligence may be found, for example, if a substantial risk of harm may be avoided by simply putting on gloves⁸³ or a face mask,⁸⁴ to avoid burns or lung damage; by driving at an appropriate speed for the condition of a tire, to avoid a high speed crash;⁸⁵ by securely shifting the transmission into the "park" position before getting out of a car parked on an incline, to avoid being squashed by the car;⁸⁶ by using a condom in an appropriate manner, to avoid pregnancy and the birth of twins;⁸⁷ or by moving cautiously over a slippery floor, to avoid injury from a fall.⁸⁸ In sum, the same cost-benefit principles of balance that define negligence define contributory negligence as well.

Other principles governing the negligence standard of care also apply to determinations of contributory negligence. One such principle is the doctrine of negligence per se for violation of a statute.⁸⁹ So, an intoxicated driver may be barred from maintaining a negligence claim against an automotive manufacturer if the intoxication violated a DUI statute and contributed to the injury.⁹⁰ Another principle is the rescue doctrine,⁹¹ relieving a rescuer of the normal responsibilities of acting according to a standard of reasonable

80. For an explanation of the basic Hand formula, see 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 2:5; see also *supra* note 73.

81. As, for example, the printing press which took three hours to restart after shutting down in *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976).

82. See *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 148 (N.J. 1979), *superseded by statute on other grounds*, *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1252 (N.J. 1990).

83. *Lee v. Crest Chem. Co.*, 583 F. Supp. 131 (M.D.N.C. 1984).

84. *Parris v. M.A. Bruder & Sons, Inc.*, 261 F. Supp. 406 (E.D. Pa. 1966).

85. Noel, *supra* note 3, at 111 (mentioning "high-speed driving on a tire not actually known to be defective" as an example of conduct which should bar recovery).

86. *E.g.*, *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 594 (Tex. 1999) ("Regardless of any danger of a mis-shift, a driver has a duty to take reasonable precautions to secure his vehicle before getting out of it."); *Ray v. Ford Motor Co.*, 514 S.E.2d 227 (Ga. Ct. App. 1999).

87. *J.P.M. v. Schmid Lab., Inc.*, 428 A.2d 515 (N.J. Super. Ct. App. Div. 1981).

88. *Reed v. Carlyle & Martin, Inc.*, 202 S.E.2d 874 (Va. 1974); *Duke v. Am. Olean Tile Co.*, 400 N.W.2d 677 (Mich. Ct. App. 1986).

89. See *Klinke v. Mitsubishi Motors Corp.*, 581 N.W.2d 272, 276 (Mich. 1998) (dictum). See generally PROSSER & KEETON ON TORTS *supra* note 50, § 36.

90. See *Hill v. Gen. Motors Corp.*, No. 98-1433, 1998 WL 911699 (4th Cir. Dec. 31, 1998).

91. See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 44, at 307-09.

prudence.⁹² Other negligence law principles applicable to contributory negligence include the objective nature of,⁹³ and role of customary behavior in relation to,⁹⁴ the standard of responsibility.

*Reed v. Carlyle & Martin, Inc.*⁹⁵ involved negligence claims by a farm hand against the manufacturer, dealer, and repairer of a piece of farm equipment, an ensilage wagon.⁹⁶ At the time of the accident, the plaintiff was standing upon and removing a five foot deep load of ensilage from the wagon.⁹⁷ A pair of revolving beaters, comprised of metal rods with spikes, at the front of the wagon deposited the ensilage onto a conveyor belt which then discharged the substance.⁹⁸ A co-worker was throwing the ensilage with a pitchfork from the rear of the wagon, but the plaintiff, standing on top of the load, decided that the quickest and easiest way to get the ensilage out of the wagon was to throw it with his pitchfork into the beaters at the front of the wagon.⁹⁹ After unloading the ensilage in this manner for some time, the plaintiff found himself standing on a bank of ensilage, which contained "a good bit of sap" and was "right slippery," sloping downward toward the beaters.¹⁰⁰ The bank collapsed, and the plaintiff slid into the beaters.¹⁰¹

The trial court granted the defendants' motions for summary judgment on the basis of the plaintiff's contributory negligence, and the Supreme Court of Virginia affirmed. The court applied to the contributory negligence context two of the classic principles of negligence doctrine: the objective nature of the negligence standard of care,¹⁰² and the effect of proof of compliance with customary behavior in ascertaining the standard and its breach.¹⁰³ In reply to the plaintiff's argument that he "didn't feel any danger" from working so close to the beaters, the court observed that "the test is not whether the plaintiff *actually* knew of the danger confronting him, but whether, in the exercise of reasonable care, he *should* have known he was in a situation of peril."¹⁰⁴ To the plaintiff's

92. See, e.g., *Dillard v. Pittway Corp.*, 719 So. 2d 188, 193 (Ala. 1998) (holding person injured in fire while trying to rescue boarder in burning house, even if contributorily negligent, could maintain negligence claim against manufacturer and seller of smoke detector "unless the rescuer's own conduct in attempting the rescue is wanton").

93. See *Reed*, 202 S.E.2d 874.

94. Compare *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 340 (Tex. 1998) (noting that customary behavior is evidence of due care), and *Nicholson v. Am. Safety Util. Corp.*, 488 S.E.2d 240, 245 (N.C. 1997) (noting that customary behavior is evidence of due care), with *Reed*, 202 S.E.2d at 877 (holding that customary behavior is not conclusive on due care).

95. 202 S.E.2d 874.

96. *Id.* at 875.

97. *Id.* at 876.

98. *Id.*

99. *Id.*

100. *Id.* at 876.

101. *Reed*, 202 S.E.2d 874.

102. *Id.* at 876; see also 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, §§ 2:3, 2:5.

103. See *Reed*, 202 S.E.2d at 877; see also 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 2:7, at 61.

104. *Reed*, 202 S.E.2d at 876 (emphasis added). The court ruled that all reasonable persons would conclude that the plaintiff in this case should have known of his peril:

The plaintiff, an experienced farmer, admitted that he was familiar with the operation of the type ensilage wagon in which he was working. Moreover, the revolving beaters were exposed to his plain view. The danger posed by the turning, spike-like mechanism was, therefore, open and obvious to the plaintiff. In exposing himself to this obvious danger, he

argument that he created a jury issue by showing that farm laborers customarily used a similar technique in unloading ensilage wagons, the court noted the longstanding negligence law principle that "the existence of a custom or usage cannot excuse conduct which is otherwise negligent" ¹⁰⁵

B. Warnings Cases

Contributory negligence doctrine operates under a special limitation in cases involving products with inadequate warnings of hidden dangers or instructions on safe use. If a warning or instruction is substantively inadequate in failing to inform users of the nature or seriousness of a hidden danger or reason for a particular instructed method of use, then a user who has not otherwise discovered the risk ordinarily will not be contributorily negligent for using the product in disregard of the danger. ¹⁰⁶ However, to be contributorily negligent for exposing oneself to a hazard, a user generally needs only to be aware of the *general* nature and magnitude of a risk, not the particular chemical or physical attributes of the product and how they specifically may affect the user's various organs. This was the holding in *Parris v. M.A. Bruder & Sons, Inc.*, ¹⁰⁷ where a spray painter of more than twenty years claimed that the manufacturer of an epoxy product had failed to warn him that inhaling the epoxy fumes could cause asthma. ¹⁰⁸ Because the plaintiff knew generally of the substantial danger of inhaling paint fumes, even if he was not aware of the specific risk of contracting asthma, the court held that the jury properly could find that he was contributorily negligent for failing to wear a mask furnished by his employer. ¹⁰⁹

C. Children

Especially before the development of comparative fault, when contributory negligence operated as a complete bar, the courts frequently adapted the contributory negligence doctrine in a protective manner for especially vulnerable plaintiffs. Courts and commentators have been particularly solicitous

failed to exercise reasonable care for his own safety.

Id. at 876-77.

105. *Id.* at 877.

106. This important point was made at an early date by Dillard and Hart:

Though these time-honored defenses [contributory negligence and assumption of risk] are frequently invoked to defeat recovery, . . . duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed. On the other hand, if the plaintiff knew of the danger from an independent source, the manufacturer's failure to warn would not be the proximate cause of the injury. Nevertheless, many courts hold that the issue of contributory negligence is involved, and is a question for the jury.

Hardy C. Dillard and Harris Hart, III, *Product Liability: Directions for Use and the Duty To Warn*, 41 VA. L. REV. 145, 163 (1955) (footnote omitted). See, e.g., *Rhodes v. Interstate Battery Sys. of Am., Inc.*, 722 F.2d 1517, 1519 (11th Cir. 1984) (applying Georgia law, the court stated, "Failure to read a warning does not bar recovery when the plaintiff is challenging the adequacy of the [warning].").

107. 261 F. Supp. 406 (E.D. Pa. 1966).

108. *Id.* at 408.

109. *Id.* at 409.

of young children who fail to appreciate product hazards.¹¹⁰ So, when a five-year-old plaintiff fell and was injured when she attempted to climb into a grocery shopping cart manufactured by the defendant, the court held that she was too young to be contributorily negligent and that her parents' negligence in failing to instruct or supervise their child should not be imputed to her.¹¹¹ As children grow older, however, the child standard of care adjusts according to the child's age, intelligence, and experience.¹¹² So, one court upheld a jury finding of contributory negligence in the case of a thirteen-year-old child who, while mowing her parents' lawn with a rotary power lawn mower, hit a pipe imbedded in the ground that protruded one and three-quarter inches above ground level.¹¹³ The mower bounced back and over her foot which was injured by the revolving blade.¹¹⁴ The court held that the jury properly found that the plaintiff either negligently failed to observe the pipe, or that she saw it and negligently failed to avoid it.¹¹⁵

Even when older children act very carelessly, courts are not likely to grant summary judgment to product suppliers but instead may be expected to allow juries to decide whether such behavior properly amounts to contributory negligence.¹¹⁶ But once a child's actions are determined to amount to contributory negligence, the child's contributory negligence may be imputed to the child's parent making a claim for wrongful death, loss of services, or similar injuries.¹¹⁷

D. Employees

As mentioned earlier, employees are sometimes effectively forced to work with dangerous machines, on dangerous tasks, or in some dangerous manner under an implicit threat of punishment or discharge for refusing to do so. In such situations, if the employee does not have a practical means to avoid the danger without simply refusing to perform the task, his or her exposure to the

110. See Jerry J. Phillips, *Products Liability for Personal Injury to Minors*, 56 VA. L. REV. 1223, 1225 (1970) ("The assumption that children will expose themselves to danger in ways that a reasonable adult would not precludes the manufacturer's reliance on the obviousness of the product's danger to the child plaintiff."). Professor Phillips concludes that "even the best of educational efforts cannot be expected to change the essential nature of children, and, unless we are prepared to ignore this fact, in many instances better product design presents the only realistic means available for protecting children against injuries." *Id.* at 1240-41. See generally M. Stuart Madden, *Products Liability, Products for Use by Adults, and Injured Children: Back to the Future*, 61 TENN. L. REV. 1205, 1207 (1994) ("Lamentably, . . . consideration of a child's inherent limitations in judgment and cognition is too often merely an afterthought."); Thomas G. Field, Jr., *The Young Consumer: A Paradigm Analysis of the Roles of Public and Private Law in Preventing and Redressing Injuries*, 29 MERCER L. REV. 523 (1978).

111. See *Porter v. United Steel & Wire Co.*, 436 F. Supp. 1376, 1379 (N.D. Iowa 1977).

112. See PROSSER & KEETON ON TORTS, *supra* note 50, § 32, at 179, § 65, at 454.

113. *Siemer v. Midwest Mower Corp.*, 286 F.2d 381 (8th Cir. 1961).

114. *Id.* at 382.

115. *Id.* at 384.

116. See *Morgan v. Cavalier Acquisition Corp.*, 432 S.E.2d 915 (N.C. Ct. App. 1993) (finding that a factual dispute existed on contributory negligence of seventeen-year-old student crushed to death when he tilted soda machine to get a soft drink and therefore reversing summary judgment for the machine manufacturer and owner).

117. And a parent's (or guardian's) own negligence (or assumption of risk) will bar the parent's claim for injuries to or the death of the child. See, e.g., *Moss v. Crosman Corp.*, 136 F.3d 1169, 1176 (7th Cir. 1998) (applying Indiana law and barring a wrongful death claim by the parents of a seven-year-old child killed while playing with a BB gun they bought for him). See generally RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 6(a) (2000).

risk may not be unreasonable under the circumstances. As a means of protecting a worker's rights in this context, some courts "lessen the amount of caution required of him by law in the exercise of ordinary care."¹¹⁸ And if an employer discovers but fails to inform its employees of a product danger, the employer's knowledge of the danger will not be imputed to its workers for purposes of contributory negligence.¹¹⁹ But workers do not have a license to act carelessly, and the conduct of a person injured on the job is properly subject to the normal standard of a reasonably prudent employee in the same or similar circumstances.¹²⁰

E. Contributory Negligence as a Defense to Strict Liability in Tort Claims

While contributory negligence is the classic defense to products liability claims brought in negligence, most contributorily negligent conduct is not a defense to a claim for strict liability in tort.¹²¹ In cases in which the plaintiff makes claims in both negligence and strict liability in tort, contributory (or comparative) negligence will be an available defense to the negligence claim but not to the strict tort claim.¹²² Because of the possibility of confusion by the jury, a court should clearly instruct the jury as to this difference in the applicability of the contributory negligence defense to different types of claims.¹²³

Comment *n* to *Restatement (Second) of Torts* § 402A provides that "simple"¹²⁴ or "ordinary"¹²⁵ contributory negligence—that is, conduct which is

118. *Young v. Aro Corp.*, 111 Cal. Rptr. 535, 537 (Ct. App. 1973) (quoting plaintiff's proposed jury instruction that the court held should have been given where a worker who knowingly operated grinding wheel at excessive speed was killed when wheel exploded).

119. *See Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 815 (9th Cir. 1974).

120. *See, e.g., Sears v. Waste Processing Equip., Inc.*, 695 So. 2d 51 (Ala. Civ. App. 1997) (affirming summary judgment for defendant where manager reached into trash compactor knowing that door cables were broken); *Reed v. Carlyle & Martin, Inc.*, 202 S.E.2d 874 (Va. 1974) (upholding summary judgment for manufacturer and seller of farm equipment on the ground of farmhand's contributory negligence as a matter of law for carelessly falling into revolving parts of equipment).

121. *See generally* Epstein, *supra* note 3; William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 OKLA. L. REV. 201 (1994); Noel, *supra* note 3; David G. Spivey, Annotation, *Products Liability: Contributory Negligence or Assumption of Risk as Defense Under Doctrine of Strict Liability in Tort*, 46 A.L.R.3d 240 (1972); John F. Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary with an Old Meaning*, 29 MERCER L. REV. 447 (1978).

122. *See, e.g., Ray v. Ford Motor Co.*, 514 S.E.2d 227 (Ga. Ct. App. 1999).

123. *See, e.g., Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348 (Md. 1985). The Maryland Court of Appeals noted:

When theories of negligence and strict liability in tort are being presented to a jury, and the defense of contributory negligence is properly before the jury, a trial judge may well find it helpful to specifically instruct the jury that contributory negligence is not a defense to the strict liability action.

Id. at 357.

124. *See, e.g., Williams v. Brown Mfg. Co.*, 261 N.E.2d 305, 309 (Ill. 1970) (characterizing "lack of due care for one's own safety as measured by the objective reasonable-man standard" as "simple contributory negligence").

125. *See id.* at 310; *see also Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 832 (N.J. 1978) (following *Williams* in rejecting "ordinary" contributory negligence as a defense to claims for strict products liability in tort).

merely careless and which does not also amount to a voluntary assumption of risk—does not serve as a bar to liability under § 402A for harm caused by a defective product. Comment *n* provides in full as follows:

n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.¹²⁶

A couple of early decisions rejected the comment *n* approach and held that contributory negligence in any form would bar liability under strict liability in tort,¹²⁷ and at least one prominent early commentator was uncertain of the

126. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

127. See *Stephan v. Sears, Roebuck & Co.*, 266 A.2d 855 (N.H. 1970); *Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976); see also *Codling v. Paglia*, 298 N.E.2d 622 (N.Y. 1973) (permitting contributory negligence as a defense to an action in strict products liability in warranty); *Dippel v. Sciano*, 155 N.W.2d 55 (Wis. 1967) (allowing comparative fault in strict liability cases). Alabama still purports to retain a “contributory negligence” defense to claims for strict products liability in tort, *Campbell v. Cutler Hammer, Inc.*, 646 So. 2d 573 (Ala. 1994) (three judges dissenting and one concurring in part and dissenting in part), but its case law is confusing and most of the recent decisions define contributory negligence in assumption of risk terms. This was also true in New Jersey, which had abolished the defense of assumption of risk in *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90 (N.J. 1959), and *McGrath v. Am. Cyanamid Co.*, 196 A.2d 238 (N.J. 1963), and so found a need to leave “contributory negligence” available as a strict products liability in tort defense to address cases involving voluntary and unreasonable encounters of product dangers, but it, too, defined the requisite type of contributory negligence in terms of assumption of risk. See generally *Cepeda*, 386 A.2d at 831. In addition, New Jersey made an exception for plaintiffs negligently encountering a known danger where the product is defective precisely because of its failure to prevent such negligent encounters. See *Bexiga v. Havir Mfg. Co.*, 290 A.2d 281, 286 (N.J. 1972) (plaintiff’s hand crushed in punch press). In *Bexiga* the New Jersey Supreme Court wrote:

[T]his case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.

The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.

Id.; see also *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 148 (N.J. 1979) (upholding *Bexiga*’s policy as “sound”); cf. *Rivera v. Westinghouse Elevator Co.*, 526 A.2d 705 (N.J. 1987) (noting that the exceptions created by *Bexiga* and *Suter* are based on specific factual settings). *Bexiga* is noted at Recent Cases, *Torts—Liability Manufacturer May be Held Strictly Liable to Employee of Purchaser for Failure to Install Safety Devices Despite Expectation that*

soundness of abandoning conventional contributory negligence as a defense in strict liability defective product cases.¹²⁸ Such courts and commentators reasoned that strict products liability in tort is based in part upon the likelihood that product defects are attributable to a seller's negligence, which, although it usually exists, is often difficult for a plaintiff to prove; that the doctrine functions as a kind of *res ipsa loquitur* or negligence per se; and that the doctrine rests upon a presumption that injured plaintiffs are incapable of protecting themselves—each of which are rationales consistent with the contributory negligence defense.¹²⁹

Despite comment *n*'s thin reasoning for abandoning the conventional tort law defense of contributory negligence on the ground that this defense is also abandoned by the doctrine of strict liability in tort for harm caused by ultrahazardous activities,¹³⁰ most courts quickly adopted comment *n*'s rejection of the defense of simple contributory negligence as a bar to strict products liability in tort.¹³¹ These courts emphasized that the doctrine of strict liability in tort discarded the concept of fault, that strict liability was premised on requiring suppliers of defective products to internalize the costs of product accidents as a means of risk administration, and that strict liability was based on the buyer's reliance upon an implicit representation that the product was safe.¹³² The doctrine of comparative fault complicates the issue by raising anew

they would be installed by purchaser, 86 HARV. L. REV. 923 (1973).

128. See Noel, *supra* note 3, at 105-19, 128-30:

The great expansion of claims and suits for injury from defective products suggests that something more than the theoretical analogy to ultrahazardous activities should be considered in determining the effect of contributory negligence. If the plaintiff could have discovered the defect in a dangerous product with little effort, it may be that his failure to inspect should be a defense in this new and expanding area of liability.

Id. at 117.

129. See *id.* at 105-19.

130. See, e.g., *McCown v. Int'l Harvester Co.*, 342 A.2d 381, 383 (Pa. 1975) (Pomeroy, J., concurring); Noel, *supra* note 3, at 115-17. It should be noted, however, that comment *n* does faithfully adapt the principles of *Restatement (Second) of Torts* § 524 to the defective product context.

131. The leading early case on point was *Williams v. Brown Mfg. Co.*, 261 N.E.2d 305 (Ill. 1970). See also *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970); *Estabrook v. J.C. Penney Co.*, 464 P.2d 325 (Ariz. 1970); *DeFelice v. Ford Motor Co.*, 255 A.2d 636 (Conn. Super. Ct. 1969); *Martinez v. Nichols Conveyor & Eng'g Co.*, 52 Cal. Rptr. 842 (Ct. App. 1966); *Perfection Paint & Color Co. v. Konduris*, 258 N.E.2d 681, 689 (Ind. 1970); *Baker v. Rosemurgy*, 144 N.W.2d 660 (Mich. Ct. App. 1966); *Magnuson v. Rupp Mfg., Inc.*, 171 N.W.2d 201, 211 (Minn. 1969); *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969); *Btin v. Ava Truck Leasing, Inc.*, 251 A.2d 278 (N.J. 1969); *Ferraro v. Ford Motor Co.*, 223 A.2d 746 (Pa. 1966); *Richard v. H.P. Hood & Sons*, 243 A.2d 910 (R.I. 1968); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967); *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969).

132. See, e.g., *McCown*, 342 A.2d at 382 (allowing a contributory negligence defense "would contradict this normal expectation of product safety"). Following *Williams*, 261 N.E.2d 305, the court in *Cepeda* remarked:

[A]cceptance of "ordinary" contributory negligence as a defense in actions for strict liability in tort would be incompatible with the policy considerations which led to the adoption of strict tort liability in the first instance. The manufacturer's duty is imposed precisely to avert foreseeable inadvertent injury to a user of a product.

Cepeda, 386 A.2d at 832 (citations omitted). See also *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 594 (Tex. 1999) ("[A] duty to discover defects, and to take precautions in constant anticipation that a product might have a defect, would defeat the purposes of strict liability."). See generally *McNichols*, *supra* note 121, at 260; see generally Noel, *supra* note 3, at 105-19,

the question of whether plaintiffs should still be specially protected from the consequences of their "simple" contributory negligence, but many courts in comparative fault regimes refuse to allow a plaintiff's careless failure to discover a product defect to be considered in apportioning damages.¹³³

As mentioned, comment *n* rests upon a division of a user's negligent misconduct into two categories: failing to discover a defect or to guard against the possibility of its existence, on the one hand, and conduct which amounts to assumption of risk, on the other—voluntarily and unreasonably encountering a known and appreciated danger. In one sense, however, these forms of negligent misbehavior might be seen to represent only the two extreme ends of the spectrum of consumer mistakes: the first describing minimally careless conduct involving a consumer's excessive trust during initial encounters with an unfamiliar product, and the other describing deliberately careless conduct concerning known and appreciated hazards of a familiar product. Arguably, neither of these categories adequately describes a consumer's ordinary careless

128-30.

133. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 161 n.14 (3d Cir. 1979) (applying Virgin Islands law); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 92 (Fla. 1976) ("[C]omparative negligence is a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect . . . or . . . to guard against the possibility of its existence."); *Simpson v. Gen. Motors Corp.*, 483 N.E.2d 1 (Ill. 1985) (Ryan, J., dissenting) (arguing against creating separate categories of plaintiff conduct exempt from comparative fault); *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983) ("[A] consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor."); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393-94 (Minn. 1977) ("[A] consumer's negligent failure to inspect a product or to guard against defects is not a defense . . ."); *Hernandez v. Barbo Mach. Co.*, 957 P.2d 147-53 (Or. 1998) ("Incidental carelessness or negligent failure to discover or guard against a product defect is not an appropriate defense . . ."); *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624 (Or. 1982) ("Fault" includes contributory negligence except for . . . failure of the injured party to discover the defect or guard against it . . ."); *Sanchez*, 997 S.W.2d at 594 (interpreting comment *n* of *Second Restatement* § 402A narrowly, and quoting *Third Restatement* § 17, cmt. *d*); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984) (affirming the rule that "negligent failure to discover or guard against a product defect is not a defense"); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 863 (W. Va. 1982) ("[C]omparative negligence is available as an affirmative defense in a cause of action founded on strict liability so long as the complained of conduct is not a failure to discover a defect or to guard against it."). Idaho has addressed this distinction by statute. See IDAHO CODE § 6-1305(1)(a) (Michie 1998). But see MINN. STAT. ANN. § 604.01.1a (West 2000) (including the "misuse of a product" within the definition of "fault"). See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17, cmt. *d*, reporters' note, at 262 (1998).

Although the *Products Liability Restatement* does not explicitly provide that negligence in failing to discover or guard against the possibility of a defect should be exempt from consideration in a comparative fault regime, it is sympathetic to this approach and suggests that a plaintiff's simple contributory negligence of this sort rarely will breach the standard of reasonable behavior:

[W]hen the defendant claims that the plaintiff failed to discover a defect, there must be evidence that the plaintiff's conduct in failing to discover a defect did, in fact, fail to meet a standard of reasonable care. In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it. Or when a plaintiff is injured due to inattention to a danger that should have been eliminated by a safety feature, there must be evidence supporting the conclusion that the plaintiff's momentary inattention or inadvertence in a workplace setting constitutes failure to exercise reasonable care. In the absence of such evidence courts refuse to submit the plaintiff's conduct to the trier of fact for apportionment based on the principles of comparative responsibility.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17, cmt. *d*, at 259.

use of a defective product, such as operating the product in a careless manner.¹³⁴ But comment *n* is not a statute,¹³⁵ and its provision excluding contributory negligence for failing to discover or guard against the existence of a defect may be reasonably interpreted to include the idea of using a product without due care that it may be defective.¹³⁶ In this manner, comment *n*'s two categories of user misconduct may plausibly be viewed as embracing all forms of contributory negligence by product users. Under comparative fault, however, there may be good reason to exclude from damages apportionment a plaintiff's negligence in failing to discover a product's defects, narrowly defined, but to reduce a plaintiff's damages for using the product in a dangerous manner.¹³⁷

F. Contributory Negligence as the Sole Proximate Cause of an Accident

With the loss of the contributory negligence defense in strict liability claims, counsel for defendants lost the most cherished arrow in their quiver. In a case involving appreciable plaintiff misconduct, a plaintiff's lawyer now may style the claim as one of strict liability in tort in order to avoid argument (and possibly evidence) on the plaintiff's negligent misbehavior. But, by rejecting a plaintiff's contributory negligence as a general defense to claims for strict products liability in tort, the law did not abolish the plaintiff's obligation to establish that a defect is a *proximate cause* of the harm.

From an early date, commentators observed that a plaintiff's contributory negligence sometimes is so significant a factor in producing an injury that it may amount to the *sole proximate cause* of the harm.¹³⁸ In an appropriate case, therefore, a defendant may properly offer evidence and argument that the plaintiff's behavior—rather than any defect in the product—was the “sole proximate cause” of the harm.¹³⁹ Thus, in cases where substantial consumer misconduct was overwhelmingly the predominant force in causing an accident, and where the role of any product defect was manifestly trivial by comparison,

134. See, e.g., *McCown*, 342 A.2d at 383 (Pa. 1975) (Pomeroy, J., concurring) (stating that plaintiff's injuries were caused not by a failure to discover a defect but rather careless use of a tractor).

135. Except in South Carolina, which codified the negligent assumption of risk defense embraced in the last sentence of comment *n*. S.C. CODE ANN. § 15-73-20 (Law. Co-op. 1976).

136. See Noel, *supra* note 3, at 111 (citing high-speed driving on a tire not known to be defective as an example of failing to guard against the possibility of a defect). Cf. PROSSER, *supra* note 51, § 102, at 670-71 (describing the negligent driving on a tire known to be unsafe as the kind of assumption of risk conduct to be distinguished from the simple negligence in failing to discover or guard against the risk that a product might be defective).

137. See *Sanchez*, 997 S.W.2d at 593-94 (interpreting narrowly *Second Restatement* § 402A cmt. *n*, and quoting *Third Restatement* § 17, cmt. *d* to hold that a plaintiff's negligence in failing to discover defect should not reduce a plaintiff's damages under comparative fault, but that negligence in dangerously using product *should* result in such a reduction).

138. See Noel, *supra* note 3, at 105.

139. On rare occasions, courts speak loosely of a plaintiff's substantial misconduct as amounting to a “superseding” cause of an accident. See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1078 n.26 (5th Cir. 1994); *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 48 (Conn. 1997); *Sabbatino v. Rosin & Sons Hardware & Paint, Inc.*, 676 N.Y.S.2d 633, 635 (App. Div. 1998); *Madonna v. Harley Davidson, Inc.*, 708 A.2d 507, 509 (Pa. Super. Ct. 1998). However, the concept of superseding causation traditionally refers only to unforeseeable intervening acts of God and behavior by third parties. See *RESTATEMENT (SECOND) OF TORTS* § 440 (1965); PROSSER & KEETON ON TORTS, *supra* note 50, § 44, at 312. Accordingly, while a plaintiff's extraordinary behavior may amount to the “sole proximate cause” of a particular accident, it appears preferable not to refer to such behavior as a “superseding” cause of the harm.

evidence and argument that the plaintiff's conduct was the sole proximate cause of the harm is entirely proper and will support a judgment for the defendant in an appropriate case.¹⁴⁰

However, a plaintiff's conduct, whether it be called "contributory negligence" or something else, can fairly be considered the sole proximate cause of an accident only if it was plainly the overriding factor in causing the harm such that, by comparison, any defect in the product, albeit a cause in fact of the accident, was clearly insignificant and morally trivial. Without close supervision by the trial court, evidence and argument on the plaintiff's conduct as the sole proximate cause of an accident may slip easily and impermissibly into a thinly veiled revival of the contributory negligence defense.

In *Sheehan v. Anthony Pools*,¹⁴¹ the plaintiff was injured when, during a swimming party at his new pool, he fell off the side of the diving board onto the concrete coping at the edge of the swimming pool.¹⁴² In plaintiff's strict tort action against the pool company, he claimed that the non-skid material on the board should have extended to and over the edges of the board and that the design of the pool's diving board-coping area was unsafe.¹⁴³ Without using the terms "careless" or "contributory negligence," defense counsel argued essentially that the injury was caused not by any problem with the design of the board or the pool, but by the manner in which the plaintiff used the board.¹⁴⁴

140. See *McCarty v. F.C. Kingston Co.*, 522 P.2d 778, 779 (Ariz. Ct. App. 1974). See also *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1485-86 (11th Cir. 1997) (applying Florida law). In this design defect case involving the rollover of a Bronco II, when the trailer it was towing swung around, the manufacturer argued that the "sole legal cause" of the accident was the improper use of the trailer rather than any defect in the vehicle:

Evidence on the issues of the trailer and driving directly refutes Plaintiffs' contention that Ford's negligence caused this accident. Ford was not limited to saying, "we didn't cause this." Ford had every right to tell the jury who or what it believed made this accident happen.

Id. at 1486. But see *Yun v. Ford Motor Co.*, 669 A.2d 1378, 1379 (N.J. 1996) (finding that proximate cause to be a jury issue in case where the plaintiff struck by another vehicle while crossing highway to retrieve spare tire that fell off van), *rev'd* 647 A.2d 841 (N.J. Super. Ct. App. Div. 1994) (which had affirmed summary judgment for manufacturer).

Possibly inappropriate uses of the sole proximate cause doctrine are *Wilson v. Vermont Castings, Inc.*, 170 F.3d 391, 396 (3d Cir. 1999) (applying Pennsylvania law and upholding jury finding that plaintiff's conduct was sole cause of accident in case where plaintiff's dress caught fire on woodburning stove allegedly defective because of the need to leave the door open to keep the fire going); *Wagner*, 700 A.2d at 48 (holding that the jury should have been instructed that it could find that plaintiff's failure to pay attention to surroundings, together with forklift operator's failure to look over shoulder as he backed up and employer's failure to maintain a safe workplace, all "combined so as to entirely supersede the lack of additional safety devices on the forklift as the proximate cause of the accident"); and *Sabbatino*, 676 N.Y.S.2d at 635 (affirming summary judgment for defendants, where plaintiff failed to heed instructions on drain cleaner to cover opening after pouring cleaner into drain).

141. 440 A.2d 1085 (Md. Ct. Spec. App. 1982).

142. *Id.* at 1087.

143. *Id.*

144. In closing argument, defense counsel argued, over objection, as follows: "You must find that this defect proximately caused the accident. The clear testimony here from Mr. Weiner and using your common sense is that if someone steps on the board with about an inch of their foot on it, they will fall off the side. That was the proximate cause, the way the board was used, not the design of the board. I am not willing to concede for a moment that there is anything defective about the board when you use the standards which are customary in the industry and any governmental regulations. Even if you feel there was, I ask you to find that the proximate cause was the way Mr. Sheehan used it, not the way it was designed."

Id. at 1090 (alteration in original (quoting defense counsel)).

The trial judge denied the defendant's request to instruct the jury that contributory negligence *was* a defense and also denied the plaintiff's request for a charge that the plaintiff's inadvertence in using the board was *not* a defense, and the jury returned a verdict for the defendant.¹⁴⁵ Reversing and remanding, the appellate court held that the trial court should have granted the plaintiff's requested instruction.¹⁴⁶

Perhaps as in *Sheehan*, argumentation on a plaintiff's contributions to an accident may easily mislead a jury as to the proper role of a plaintiff's conduct in establishing liability and damages in a products liability case.¹⁴⁷ Thus, in addition to closely monitoring such arguments to avoid their abuse, courts should be prepared to instruct juries carefully on the limited roles and effect of sole proximate cause and consumer carelessness in the law of strict products liability in tort.

III. ASSUMPTION OF RISK

A. In General

Originating as a defense to negligence claims about two centuries ago,¹⁴⁸ assumption of risk has long been one of the classic defenses to products liability claims.¹⁴⁹ As a common law and statutory¹⁵⁰ defense in many jurisdictions, even to claims for strict products liability in tort, assumption of risk remains a total bar to liability in a good number of states, thus significantly distinguishing it from contributory negligence which now serves merely to reduce damages in most cases.¹⁵¹ Because the situations which give rise to the assumption of risk defense are often quite normal and foreseeable, the assumption of risk defense is not restricted, like the defense of product "misuse,"¹⁵² to product use situations so unusual as to be characterized as unforeseeable. For these reasons, assumption of risk may well be the most potent of all the plaintiff misconduct defenses of modern products liability law.

145. *Id.* at 1087.

146. *Id.* at 1092.

147. See the several questionable cases cited *supra* note 131.

148. See *Cruden v. Fentham*, 2 Esp. 685, 170 Eng. Rep. 496 (K.B. 1799). See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 480.

149. See generally Epstein, *supra* note 3; Robert E. Keeton, *Assumption of Products Risks*, 19 SW. L.J. 61 (1965); Robert E. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961) [hereinafter Keeton, *Assumption of Risk in Products Liability Cases*]; McNichols, *supra* note 121; Noel, *supra* note 3; Spivey, *supra* note 121 (discussing contributory negligence and assumption of risk as defenses to claim for strict products liability in tort); Aaron D. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974); Vargo, *supra* note 121; Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872 (1982) (discussing assumption of risk as defense to strict products liability). For an excellent theoretical consideration of the doctrine, see Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987).

150. While assumption of risk is a common law doctrine, tort and products liability legislative reform provisions in many states govern the effect of various forms of user misconduct including assumption of risk. For a discussion of such statutes, see *supra* Part I.

151. See *supra* Part II. Under the comparative fault reforms of the great majority of states, a plaintiff's contributory negligence, at least if less than the defendant's negligence, serves only to diminish a plaintiff's damages, not to bar the claim altogether. See also *supra* Part I; 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 15.

152. See *infra* Part IV.

Assumption of risk may be distinguished from the other "misconduct" defenses in a more fundamental way. Conduct which gives rise to an assumption of risk *may* be unreasonable; if so, it overlaps the defense of contributory (or comparative) negligence which separately may operate to bar liability (or to reduce the plaintiff's damages). But conventional assumption of risk doctrine does not *require* that a plaintiff's decision to incur a risk be unreasonable; as discussed below, a plaintiff will be barred from maintaining a negligence claim if he or she assumes a risk for reasons and in a manner reasonable in all respects.¹⁵³ Nor, as just mentioned, does the assumption of risk defense require that the plaintiff have used a product outside the boundaries of its intended and foreseeable limits of fair use, as required by the misuse defense. Thus, unlike the defenses of contributory negligence and product misuse, which arise from user conduct that may be conceived as "improper,"¹⁵⁴ and so fairly classified as "*misconduct*," conduct giving rise to the conventional assumption of risk defense does not so comfortably fit the "*misconduct*" mold.

The underlying idea of the assumption of risk defense is that a user has fully consented to incur a risk which the user fully comprehends.¹⁵⁵ By the act of incurring the risk, the user thus implicitly agrees to take responsibility for any harmful consequences that may result from the encounter and so relieves the person who created the risk from responsibility. In other words, *volenti non fit injuria*.¹⁵⁶

Thus, a person may assume the risk of injury if he uses his hand instead of a metal stomper to push meat into a grinder;¹⁵⁷ reaches from outside a forklift between horizontal cross bars to engage the throttle and so lowers a bar upon his arm;¹⁵⁸ slips from the top of a tanker truck covered with oil that he knows is "real slick";¹⁵⁹ is run over while jump-starting a tractor that he knows may lurch forward when it starts;¹⁶⁰ slips and is cut by a power mower blade left spinning while he moves an obstacle in the mower's path;¹⁶¹ inflates a truck tire on a multi-piece rim that he fears may be improperly assembled and could

153. See, e.g., *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 74 (Neb. 1987) (stating that assumption of the risk negates liability even if plaintiff acts with due care). See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 481, 485 ("[T]he plaintiff may be acting quite reasonably, and not be at all negligent in taking the chance . . .").

154. "Improper" conduct can be characterized as conduct which is either unreasonable (contributory negligence) or unforeseeable (misuse). See *supra* Part II and *infra* Part IV, respectively.

155. "[A]ssumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect." *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 74 (Neb. 1987).

156. "[A] person is not wronged by that to which he or she consents." BLACK'S LAW DICTIONARY 1569 (7th ed. 1999). See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 480.

157. *Green v. Sanitary Scale Co.*, 431 F.2d 371 (3d Cir. 1970) (applying Pennsylvania law).

158. *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973) (applying Illinois law).

159. *Hedgepeth v. Fruehauf Corp.*, 634 F. Supp. 93, 96 (S.D. Miss. 1986) (indicating that oil tanker truck driver, who slipped while walking on rounded top of tanker, testified that he knew top was "real slick and real cruddy").

160. *Novak v. Navistar Int'l Transp. Corp.*, 46 F.3d 844 (8th Cir. 1995) (applying South Dakota law).

161. *Denton v. Bachtold Bros.*, 291 N.E.2d 229 (Ill. App. Ct. 1972).

explosively fly apart;¹⁶² or entangles his pants in a moving part of a machine that he knows could injure him if he gets too close.¹⁶³

For a product user¹⁶⁴ to assume responsibility for a risk to the exclusion of the defendant, his or her decision must be based upon an understanding of the nature of the risk, and it must be a choice that is freely made: a person cannot "consent" to what he does not know nor to what is forced upon him. For this reason, assumption of risk arises only when a user's encounter with a risk is both "informed" and "voluntary." These two basic requirements are reflected in the definition, or statement of elements, of the assumption of risk doctrine: first, the plaintiff must know and understand the risk, and, second, the plaintiff's choice to encounter it must be free and voluntary.¹⁶⁵

Because each aspect of assumption of risk involves an inquiry into a particular person's state of mind—the person's knowledge of and appreciation of risk and the extent to which the person's choice to encounter it was free and voluntary—the assumption of risk determination is peculiarly one of fact for a jury to resolve.¹⁶⁶

The ideas of knowledge and appreciation go together like a horse and carriage: in order to truly "know" something, a person must understand or appreciate it; and knowledge is a *sine qua non* of appreciation, for one cannot "appreciate" what one does not know. Because knowledge and appreciation of a risk are intertwined in this manner, the defense is sometimes defined in terms of two elements: (1) knowledge and understanding, and (2) voluntariness.¹⁶⁷ Yet many courts and commentators subdivide the first element into its two components, and so divide the defense into three separate elements: (1) knowledge, (2) appreciation, and (3) voluntariness.¹⁶⁸ Some courts define this

162. *Bishop v. Firestone Tire & Rubber Co.*, 814 F.2d 437, 446 (7th Cir. 1987) (showing that plaintiff stated, prior to explosion of tire mounted on multi-piece rim, that he "hoped the tire would not explode").

163. *Johnson v. Mid-South Distrib., Inc.*, Prod. Liab. Rep. (CCH) ¶ 7984 (Tenn. Ct. App. 1977).

164. While most products liability cases involve product users, the assumption of risk defense may also apply to claims by injured bystanders. *See, e.g., Brown v. Link Belt Corp.*, 565 F.2d 1107 (9th Cir. 1977) (finding that worker was run over by crane when worker wandered into area he knew was in crane operator's blind spot); *Baker v. Chrysler Corp.*, 127 Cal. Rptr. 745 (Ct. App. 1976) (finding that pedestrian, hit by allegedly uncrashworthy car with protruding metal headlight protector, ran across street trying to beat oncoming car). *But see Barr v. Rivinius, Inc.*, 373 N.E.2d 1063, 1068 (Ill. App. Ct. 1978) (2-1 decision) (holding that worker hit by roadgrader/shoulder-spreader machine could not assume risk because he was not a user).

165. *See PROSSER & KEETON ON TORTS*, *supra* note 50, § 68, at 486-87.

166. *See, e.g., Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 74 (Neb. 1987) (holding that the question of assumption of risk is ordinarily for jury); *Heil Co. v. Grant*, 534 S.W.2d 916, 921 (Tex. Civ. App. 1976) ("Whether an injured person actually knew of the danger is peculiarly within the province of the jury."). *But see Frey v. Harley Davidson Motor Co.*, 734 A.2d 1, 9 (Pa. Super. Ct. 1999) ("[A]ssumption of the risk, particularly in product liability cases, is a question of law to be determined by the court.").

167. *See PROSSER & KEETON ON TORTS*, *supra* note 50, § 68, at 487 ("[F]irst, the plaintiff must know that the risk is present, and he must further understand its nature; and second, his choice to incur it must be free and voluntary . . .").

168. *See, e.g., Mid-South Distrib., Inc.*, Prod. Liab. Rep. (CCH) ¶ 7984 ("[A]ssumption of the risk acts in bar of recovery when the proof shows that the plaintiff has (1) knowledge of the danger, (2) an appreciation of that danger, and (3) voluntarily exposed himself to that danger.").

defense in slightly varying ways,¹⁶⁹ sometimes without specifically enumerating the elements but usually emphasizing the basic nature of the plaintiff's conduct as reflecting a free and voluntary encounter with a known and appreciated risk.¹⁷⁰

B. Knowledge and Appreciation

"Knowledge," it is said, "is the watchword of assumption of risk."¹⁷¹ A plaintiff's vague and general understanding that a product may be dangerous if not carefully used is neither "knowledge" nor "appreciation" of a particular risk of harm. If the plaintiff does not know just *how* a product may be hazardous, then the plaintiff cannot assume the risk that he may be injured by that hazard.¹⁷² Particularly in jurisdictions which do not separately require that the risk be "appreciated," courts sometimes require that the plaintiff know of

169. See, e.g., *Forrest City Mach. Works, Inc. v. Aderhold*, 616 S.W.2d 720, 724 (Ark. 1981) ("[A]ssumption of risk bars recovery where (1) a dangerous condition exists which is inconsistent with the injured party's safety, (2) the injured person is actually aware of the condition and appreciates the danger, and (3) the injured person voluntarily exposes himself to the danger which produces the injury."); *Gann v. Int'l Harvester Co.*, 712 S.W.2d 100, 105 (Tenn. 1986) ("[I]t must be shown that the plaintiff, (1) discovered the defect, (2) fully understood the danger it presented, and (3) disregarded this known danger and voluntarily exposed himself or herself to it.").

170. See, e.g., *Mid-South Distrib., Inc., Prod. Liab. Rep. (CCH) ¶ 7984*; see also *Heil Co.*, 534 S.W.2d at 920 (analyzing the facts separately in terms of knowledge, appreciation, and voluntariness, but stating the nature of the theory in blended fashion: "The theory of the assumption of risk defense is that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger.").

171. *PROSSER & KEETON ON TORTS*, *supra* note 50, § 68, at 487 (quoting *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Thompson*, 236 F. 1, 9 (6th Cir. 1916)); see also *Mid-South Distrib., Inc. Prod. Liab. Rep. (CCH) ¶ 7984* ("Knowledge on the part of the plaintiff is the keystone of the doctrine."); *Jara v. Rexworks Inc.*, 718 A.2d 788, 795 (Pa. Super. Ct. 1998) ("Nearly all cases in this area focus on the element of the defense encompassing knowledge of the risk.").

172. "Knowledge of the general hazard involved in operating a punch-press machine will not support the assumption of risk defense." *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971), *cited in Heil Co.*, 534 S.W.2d at 921. See also *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 620 (Pa. Super. Ct. 1983). In *Burch*, the plaintiff's electric mower shut off twice and would not restart until he pushed the reset button. *Id.* at 618. The third time the motor shut off, plaintiff leaned the mower on its side, without disturbing the reset button, and reached into the blade area to remove the accumulated clumps of grass. *Id.* The motor unexpectedly restarted and severely injured plaintiff's hand. *Id.* Plaintiff's suit was based upon the mower's failure to have a deadman's device that would have stopped the blade automatically once the user stopped pushing the mower. *Id.* Affirming a lower court decision for the plaintiff, the appellate court held that the jury could reasonably find that the plaintiff had not assumed the risk because he believed that the motor blade was stopped and could be restarted only if the reset button were depressed. *Id.* at 620.

Contrast *Denton v. Bachtold Bros.*, 291 N.E.2d 229, 231 (Ill. App. Ct. 1972), where the plaintiff understood that the blade of the mower remained spinning. As plaintiff was mowing his grass up an incline with a rotary lawn mower manufactured by defendant, he approached a barrel in his path. *Id.* at 230. He disengaged the driving clutch and stopped pushing the mower, but did not release the clutch controlling the blades. *Id.* As he worked to move the barrel, his feet slipped on the newly mown grass and into the machine. *Id.* Plaintiff sued, claiming that the mower was defective because it was not equipped with a "deadman's throttle." *Id.* at 231. Affirming a directed verdict for the defendant, the court held that the plaintiff had assumed the risk.

the *specific* risk.¹⁷³ This means the plaintiff must know more than that the product encountered may be dangerous.¹⁷⁴ The plaintiff must further understand with some particularity how the product may cause an injury, so that he or she is able to evaluate the likelihood and seriousness of potential injury and thereby make an informed decision on whether or not to engage the risk.

If one were to apply the appreciation of specific risk requirement quite literally, this aspect of the doctrine would swallow the rule and prevent it from ever being applied. In the first article devoted to assumption of risk in the products liability context,¹⁷⁵ Robert Keeton pointed out the apparent "enigma," or self-contradiction, inherent in the "full appreciation of risk" requirement.¹⁷⁶ "Risk" implies a degree of want of appreciation of the forces that are at work in a given factual setting, since if one knew and understood all these forces he would know that injury was certain to occur or that it was certain not to occur.¹⁷⁷ Rejecting the defense, a court made a similar point in a case brought by a wireman who was severely shocked when he began to clean electrical equipment that was not de-energized, due to a defect in the way the equipment was configured.¹⁷⁸ "To conclude that [the plaintiff] was aware of the specific defect in this configuration would be tantamount to believing that he intended to commit suicide."¹⁷⁹ But most courts have interpreted the appreciation requirement more loosely, ruling that this element requires that a plaintiff understand neither the precise nature and operation of the mechanical, chemical, or biological mechanisms that may result in harm¹⁸⁰ nor the precise manner in which a product may be legally "defective."¹⁸¹

173. See, e.g., *Austin v. Lincoln Equip. Assoc.*, 888 F.2d 934, 937 (1st Cir. 1989) (applying Rhode Island law to require the defendant to show that plaintiff "appreciated the specific danger" of the product to prevail on a motion for directed verdict); *Jackson v. Harsco Corp.*, 673 P.2d 363, 366 (Colo. 1983) (en banc) ("The defendant must demonstrate that the plaintiff had actual knowledge of the specific danger posed by the defect in design, and not just general knowledge that the product could be dangerous."); *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1275 (D.C. 1995) ("[I]n order to establish an assumption of risk defense in a strict liability action, the defendant must show that the plaintiff knew of the specific defect in the product and was aware of the danger arising from it").

174. See *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367, 379 (E.D. Ark. 1971); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 74 (Neb. 1987) ("A user's knowledge about the general danger or hazard in using a product will not support the defense."); *Heil Co.*, 534 S.W.2d at 921.

175. Keeton, *Assumption of Risk in Products Liability Cases*, *supra* note 149.

176. *Id.* at 124.

177. *Id.*

178. *Campbell v. ITE Imperial Corp.*, 733 P.2d 969, 971 (Wash. 1987).

179. *Id.* at 976.

180. See, e.g., *Ensor v. Hodgeson*, 615 S.W.2d 519, 525 (Mo. Ct. App. 1981) ("[K]nowledge of the precise engineering explanation of the defect is not necessary. It is sufficient that the user realizes that there is a problem with the product that renders it dangerous to use."); *Heil Co.*, 534 S.W.2d at 922 ("The assumption of risk defense is based upon the injured person's awareness of the danger of injury rather than an awareness of the producing causes of the injury.").

181. See *Heil Co.*, 534 S.W.2d at 921 ("[T]he assumption of risk defense is premised upon knowledge of the dangerous condition of a product rather than recognition of its defectiveness."). But see *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1275 (D.C. 1995) (noting that evidence failed to show that plaintiff "had actual knowledge of the liftgate's alleged design defect—the lack of a back-up system (e.g., a second cylinder or other safety device) to prevent the heavy liftgate from free-falling in the event of a mechanical failure").

Although the courts in Pennsylvania have purported to require the defendant to prove that the plaintiff knew of the specific "defect" which caused his injury, they appear not to have really meant it. In *Mackowick v. Westinghouse Elec. Corp.*, 541 A.2d 749 (Pa. Super. Ct. 1988),

For example, in *Heil Co. v. Grant*,¹⁸² the plaintiff's decedent was crushed to death while he and his brother were performing repair work under a dump truck.¹⁸³ The raised bed suddenly descended when one of the men accidentally bumped the "pullout cable" attached to the hydraulic valve that controlled the raising and lowering of the bed.¹⁸⁴ Just before the accident, the decedent's brother had warned him that the bed would crash down if he hit the cable.¹⁸⁵ The plaintiff sued the manufacturer, claiming that the hoist mechanism was defectively designed, and the defendant asserted assumption of risk.¹⁸⁶ The trial court excluded certain testimony going to assumption of risk, the jury found for the plaintiff, and the defendant appealed.¹⁸⁷ The Texas Court of Civil Appeals reversed.¹⁸⁸ To the plaintiff's argument that the decedent had general knowledge that working beneath the dump truck could be dangerous, but had no knowledge of the specific defect involved, the appeals court noted that the specific danger was that hitting the cable would cause the bed to descend, which the decedent knew.¹⁸⁹ To the plaintiff's contention that the requisite knowledge must pertain to a "defect," rather than a danger, the court noted that "the assumption of risk defense is premised upon knowledge of the dangerous condition of a product rather than recognition of its defectiveness."¹⁹⁰

In another case, *Haugen v. Minnesota Mining & Mfg. Co.*,¹⁹¹ the plaintiff was injured when the grinding wheel he was working on exploded into three pieces, one of which hit him in the eye.¹⁹² The plaintiff was not wearing safety goggles at the time of the accident, although two pair were available in the

Judge Brosky, writing in dissent, noted that:

[U]se of the term "defect", with its mechanical and technological connotations, has caused much confusion among members of the bench and bar. Some have argued that a plaintiff is aware of a specific defect only if he understands the mechanical process which causes the item to be dangerous. This interpretation is an overly technical misstatement of the law. For assumption of the risk to apply, a plaintiff needn't understand the mechanical process, but must be subjectively aware of the nature, character, and extent of the danger posed by the specific attribute which is allegedly defective; this requires more than a general awareness by the plaintiff that the product is somehow dangerous.

Id. at 753 (Brosky, J., dissenting); see also *Lonon v. Pep Boys, Manny, Moe & Jack*, 538 A.2d 22 (Pa. Super. Ct. 1988). In *Lonon* the plaintiff was injured while attaching jumper cables to his battery, which exploded, splashing sulfuric acid into his eyes. *Id.* at 24. His expert theorized that the explosion was caused by a defective weld in the battery; the defendant's expert opined that the explosion was due to the plaintiff's failure to use the spark-free jump-starting procedures specified in the instructions referred to by a warning on the battery. *Id.* The plaintiff had worked at a service station, knew that batteries contain acid, had jump-started cars fifty times or more, had witnessed sparks created during jump starts, and had heard of batteries exploding. *Id.* at 25. The superior court held that the plaintiff could not have assumed the risk of the defect in the battery because he did not know about it. *Id.* However, he may have assumed the more general risk that the battery might explode if he did not use the jumper cables properly. *Id.* at 26.

182. 534 S.W.2d 916 (Tex. Civ. App. 1976).

183. *Id.* at 919.

184. *Id.*

185. *Id.*

186. *Id.* at 920.

187. *Id.*

188. *Heil Co.*, 534 S.W.2d at 927 (Tex. Civ. App. 1976).

189. *Id.* at 922.

190. *Id.* at 921.

191. 550 P.2d 71 (Wash. Ct. App. 1976), superseded by statute, *Van Hout v. Celotex Corp.*, 853 P.2d 908, 912 (Wash. 1993).

192. *Id.* at 75.

shop, and he knew of their importance from his prior safety training.¹⁹³ The trial court instructed the jury: "It is not enough to bar recovery by the plaintiff on the defense of assumption of risk that the plaintiff knew that there was a general danger connected with the use of the product, but rather it must be shown that the plaintiff actually knew, appreciated, and voluntarily and unreasonably exposed himself to the specific defect and danger which caused his injuries."¹⁹⁴ On appeal, affirming judgment for the plaintiff, the court held the instruction to be proper:

[P]laintiff testified that he was aware that dust or small particles of wood were likely to be thrown from the dashboard while he was grinding on it. He further testified that he did not deem it necessary to wear the available safety goggles because he felt that his eyeglasses would provide adequate protection from this danger. If plaintiff assumed any risk at all, it was the risk of having dust or small particles of wood or metal lodged in his eye during the grinding process. He was obviously not aware of the latent defect in the structural integrity of the disc itself and the danger posed by that defect. This latent defect was not and probably could not have been known by the plaintiff. Plaintiff, therefore, could not have assumed the risk engendered by the defect.¹⁹⁵

Whether and the extent to which a plaintiff in fact was aware of a particular risk involves a *subjective* inquiry into the plaintiff's state of mind.¹⁹⁶ Stated otherwise, the knowledge question in such cases concerns the peculiarly factual issue of what the plaintiff himself knew and understood, *not* what a reasonable or normal person would or should have known and understood in similar circumstances. Sometimes courts speak loosely and misstate the principle,¹⁹⁷ but it is plainly wrong for a lawyer to argue or for a court to instruct a jury that assumption of risk involves a question of whether the plaintiff "*should* have known" of the risk; the only proper question is what the plaintiff did in fact know.¹⁹⁸ Nor does the plaintiff's age, intelligence, experience, information, or judgment directly help establish, as it does in setting a child's standard of care

193. *Id.*

194. *Id.* at 74.

195. *Id.* at 75.

196. *See, e.g.,* Jackson v. Harsco Corp., 673 P.2d 363, 366 (Colo. 1983) (en banc); Warner Fruehauf Trailer Co. v. Boston, 654 A.2d 1272, 1275 (D.C. 1995); Labrie v. Pace Membership Warehouse, Inc., 678 A.2d 867, 872 (R.I. 1996) ("The standard is a subjective one requiring us to review the evidence to determine what this particular plaintiff actually saw, knew, understood, and appreciated at the time of his injury."); *see also* PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 487.

197. *See, e.g.,* Bereman v. Burdolski, 460 P.2d 567, 569 (Kan. 1969) (approving instruction that plaintiff was barred if he continued to use a vehicle once he was aware of a defect in the brakes or "should have been aware of it").

198. *See, e.g.,* Heil Co. v. Grant, 534 S.W.2d 916, 921 (Tex. Ct. App. 1976) ("The fact that the injured person *should have known* of the danger will not support the assumption of risk defense.").

for negligence and contributory negligence, a standard of proper behavior.¹⁹⁹ The assumption of risk question is properly framed as whether this particular plaintiff *in fact* was subjectively aware of and appreciated this particular risk. That said, a jury is not required to believe the plaintiff's testimony as to his or her state of mind, and the jury may test the plaintiff's avowals of what he or she understood against what the jury believes people with similar personal characteristics—such as “age, or lack of information, experience, intelligence, or judgment”²⁰⁰—ordinarily understand when confronting a similar product hazard.²⁰¹ This distinction is a fine one, and it is easy for a lawyer or court to confuse the subjective standard that properly is at issue with the kind of objective framework that may help a jury resolve the subjective issue of the plaintiff's state of mind. While such confusion is understandable, it may quite easily upset the outcome of a case and so should be scrupulously avoided.²⁰²

199. However, these factors provide circumstantial evidence of what the plaintiff in fact did know and understand. An intelligent adult familiar with the product is more likely to be found to have assumed a risk than is an inexperienced or dim-witted adult, or a child. *Compare* *Bakunas v. Life Pack, Inc.*, 531 F.Supp. 89 (E.D. La. 1982) (finding assumption of risk where a movie stuntman performed free fall from 323 feet into air-inflated cushion rated only to 200 feet), *Barnes v. Harley-Davidson Motor Co.*, 357 S.E.2d 127 (Ga. Ct. App. 1987) (finding assumption of risk where a motorcyclist of nearly 20 years, who collided with stalled car at night, claimed that motorcycle should have been equipped with crash bars as standard equipment and that head-lamp provided too little light at high-speed), *and* *Mackowick v. Westinghouse Elec. Corp.*, 541 A.2d 749 (Pa. Super. Ct. 1988) (finding assumption of risk where an experienced electrician stuck screwdriver into energized capacitor-box), *with* *Nettles v. Electrolux Motor AB*, 784 F.2d 1574 (11th Cir. 1986) (finding no assumption of risk where an experienced but dim-witted woodcutter, who was injured when chain saw kicked back and had been injured by kickbacks before, knew that saws were available which were less likely to cause injury from kickbacks), *and* *Forrest City Mach. Works, Inc. v. Aderhold*, 616 S.W.2d 720 (Ark. 1981) (finding no assumption of risk where an eight-year-old caught pants in rotating power take-off shaft attached to tractor while climbing off grain cart).

200. RESTATEMENT (SECOND) OF TORTS § 496D, cmt. c (1965); *see also id.* §§ 496A cmt. d, and 496C cmt. e.

201. The Texas court explains this well:

An injured person's knowledge of a dangerous condition or defect is measured subjectively; i.e., by that person's actual, conscious knowledge. The fact that the injured person *should have known* of the danger will not support the assumption of risk defense. Sometimes, however, that person may know such facts as to be charged with knowledge of the danger. This standard would be applied when it was difficult or impossible to determine the state of the injured person's mind; as it was in the instant case of a fatal injury.

Heil Co., 534 S.W.2d at 920-21 (citations omitted). The Texas court sensitively tested the decedent's probable knowledge against a standard based upon his own level of age, intelligence, experience, and other factors. *Id.* at 922.

202. *See, e.g.*, PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 76 (Supp. 1988) which observes:

[To] state the doctrine in terms of what the plaintiff “knew or should have known” about the danger . . . is calculated at best to confuse the jury, and it is usually seriously misleading, since the apparent question put by such a standard is whether the plaintiff ought to have perceived the danger—by some external, objective standard of proper behavior—rather than the subjective question of whether the plaintiff himself actually knew the risk was present. But this is plainly wrong, and the use of “should have known” language in such instructions to the jury should therefore be prohibited. What the courts have here been searching for is some way to let the jurors know that they do not have to take the plaintiff at his word, but that they may instead test his protestations of ignorance of the risk by some external standard based on ordinary principles of credibility and common sense. It would be much better if the courts would simply say so.

If a plaintiff does not know of or understand a risk, it is axiomatic that the assumption of risk defense will not bar his injuries resulting from that risk, as discussed above. Accordingly, if a product is defective because the manufacturer has not warned of a hidden risk, then a plaintiff unaware of that risk cannot be barred by the doctrine of assumption of risk.²⁰³ If a defendant denies the existence of the risk,²⁰⁴ or conceals it from consumers,²⁰⁵ as did the manufacturers of cigarettes for several decades, the assumption of risk defense may be disallowed.²⁰⁶ But a plaintiff's knowledge may come from any source, and assumption of risk may be one reason²⁰⁷ to bar a claim that a manufacturer failed to provide an adequate warning of a risk which the plaintiff already knows and understands.²⁰⁸

C. Voluntary Encounter

The second important limitation on the assumption of risk defense is that a plaintiff's decision to encounter a risk must be "free and voluntary."²⁰⁹ The notions of appreciation and voluntariness to some extent overlap, in that the notion of consent supporting assumption of risk suggests that the plaintiff makes a true and meaningful choice to engage a particular risk, to expose himself to a particular risk of harm, presumably to advance an interest (even mere convenience) that the plaintiff considers more valuable than avoidance of the risk. "Choice" in this context means, first, that the plaintiff understands the nature of the risk encountered; second, that the plaintiff has available one or more alternative courses of action by which he or she may reasonably avoid the risk; and third, that the plaintiff then decides that his or her interests will best be served by encountering the danger.

If a plaintiff's only or best "choice" is to encounter a known risk, then the encounter is not "voluntary." As just discussed, the voluntary requirement in assumption of risk essentially means that the plaintiff has a true choice, that he or she has *reasonable* options available to avoid the risk. While defining the consensual notions of voluntariness and choice in reasonableness terms may appear to be mixing apples and oranges, it probably is the best way to give content to this requirement. There is something wrong, indeed illogical and perverse, with a doctrine based on a plaintiff's *consent* that permits a defendant

Id.

203. For the classic statements of this principle, see generally *Wright v. Carter Products, Inc.*, 244 F.2d 53, 60 (2d Cir.1957); *McClanahan v. California-Spray Chem. Corp.*, 75 S.E.2d 712, 725 (Va. 1953); and Keeton, *Assumption of Risk in Products Liability Cases*, *supra* note 149, at 145. A more recent application is *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1275 (D.C. 1995).

204. See *Wilks v. Am. Tobacco Co.*, 680 So. 2d 839, 843 (Miss. 1996).

205. See, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 146-49 (3d Cir. 1998) (applying Pennsylvania law and affirming decertification of Pennsylvania class action).

206. But see *Gilboy v. Am. Tobacco Co.*, 582 So. 2d 1263, 1265-66 (La. 1991) (recognizing this defense but denying defendant's motion for summary judgment on this issue).

207. The absence of cause in fact may be another reason. See *Haesche v. Kissner*, 640 A.2d 89, 92 (Conn. 1994); see also *Plummer v. Lederle Labs.* 819 F.2d 349, 359 (2d Cir. 1987) ("no harm could have been caused by failure to warn of a risk already known," quoting *Rosburg v. Minnesota Mining & Mfg. Co.*, 226 Cal. Rptr. 299, 305 (Dist. Ct. App. 1986)). See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, ch. 12.

208. See, e.g., *Heil Co.*, 534 S.W.2d. at 922-23. In *Heil* the plaintiff alleged that the dump truck was defective because the manufacturer had failed to provide a warning of the pullout cable hazard, but the decedent's brother had warned him of just that risk. *Id.*

209. PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 490.

to avoid responsibility for causing harm by forcing a danger upon the plaintiff, "forcing" because the plaintiff has no reasonable means to avoid it. "Where the defendant puts him to a choice of evils, there is a species of duress, which destroys the idea of freedom of election By placing him in the dilemma, the defendant has deprived him of his freedom of choice, and so cannot be heard to say that he has voluntarily assumed the risk."²¹⁰ On the other hand, if a plaintiff has a perfectly reasonable way to avoid a danger created by the defendant, yet knowingly chooses to encounter it, then he cannot complain that he was compelled to take this path, for such a choice is free and voluntary.²¹¹

The voluntariness aspect of assumption of risk is a chimerical concept, for it is difficult to imagine why a person who truly understands a substantial risk of harm would not avoid it if there were a reasonable way to do so. No doubt there are occasional cases where a plaintiff acts with complete abandon of dangers that he or she full well knows to lie within a product—as when a person sticks his hand into a meat grinder because it is "more convenient" than using the metal stomper that is provided,²¹² continues to ride at high speed a motorcycle with a wobbly front end on a pleasure trip without "the slightest compulsion of business or otherwise";²¹³ or sticks his arm through the cross bars of a fork lift to activate the control lever to lower the bars, rather than going inside the vehicle to do so, because he is "in a hurry and [decides to take] a calculated risk that he could get his hand out of the way before the forks hit him."²¹⁴ In "calculated risk" cases such as these, assuming that the plaintiff truly appreciates the specific risk, the plaintiff's risk encounter is clearly advertent and so in that sense voluntary.²¹⁵

210. *Id.* at 490-91; *see, e.g.,* *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 389 S.E.2d 155 (S.C. Ct. App. 1989). In *Wallace*, in which the plaintiff was injured while cleaning up effects of a soft drink bottle explosion, Judge Bell reasoned:

The plaintiff's acceptance of a risk is not voluntary if the defendant's wrongful conduct leaves him no reasonable alternative course of conduct in order to avert harm to himself or another. . . . [T]he explosion of the defective bottle left him with no reasonable alternative. He had a choice between two evils: he could leave the spill on the floor with the risk that he or others might be injured by its presence or he could undertake to remove the spill with the risk that he or another would be injured in the process of cleaning up. In other words, either choice entailed risk. In these circumstances, his choice to remove the hazard was not a voluntary assumption of risk. The Defendants had created a condition of peril which involved a risk of harm no matter which choice Wallace made. Risk was unavoidable in the circumstances.

Id. at 158-59 (citations omitted).

211. PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 491 provides:

In all of these cases, of course, the danger may be out of all proportion to the value of any benefits involved, and so the plaintiff may be charged with contributory negligence for unreasonably choosing to confront the risk. And where there is a reasonably safe alternative open, the plaintiff's choice of the dangerous way is a free one, and may amount to assumption of risk, negligence or both.

212. *Green v. Sanitary Scale Co.*, 431 F.2d 371 (3d Cir. 1970) (applying Pennsylvania law).

213. *Saeter v. Harley-Davidson Motor Co.*, 8 Cal. Rptr. 747, 753 (Dist. Ct. App. 1960).

214. *Moran v. Raymond Corp.*, 484 F.2d 1008, 1016 (7th Cir. 1973) (applying Illinois law).

215. In workplace settings, such "advertent" encounters may not be truly voluntarily if they are compelled in some manner by the employment situation, as discussed *infra* text accompanying notes 226-32.

More typical, however, are cases where the plaintiff may fully understand a specific risk but momentarily forgets about it or becomes distracted and then encounters it inadvertently. For example, a plaintiff might appreciate with specificity that if one's foot slips under a power mower with the blade revolving it is likely to be cut,²¹⁶ that getting clothing caught in a rotating part of machinery may well cause a limb to become entangled in the machine,²¹⁷ or that hitting the pullout cable beneath a dump truck is likely to cause the bed to come crashing down.²¹⁸ When such a plaintiff thereafter accidentally engages such a risk, which though earlier appreciated was not in the plaintiff's mind at the time of the accidental encounter, courts often apply the assumption of risk defense on a finding that the encounter was "voluntary."²¹⁹

While it is true that such plaintiffs have the last and sometimes best chance to prevent such injuries,²²⁰ since risk control at the time of the risk encounter lies exclusively with them, inadvertent encounters with the product itself may more appropriately be viewed as careless mistakes than as consensual ("voluntary") decisions to incur particular risks of harm. Plaintiffs in such situations may choose to work around a risk which they understand may cause them harm if they were accidentally to engage certain parts of the machine, and so in this manner they may be said to voluntarily encounter such risks of harm. But the "encounter" of relevance in such cases might more properly be viewed as the *specific* encounter with the unreasonably dangerous aspect of a machine at the time of the accident, rather than the encounter of a *general* risk that such a specific encounter might sometime occur.²²¹ If an accident results from the plaintiff's inadvertent causative behavior, as from slipping into or otherwise accidentally contacting the dangerous parts of a machine, the plaintiff's operative behavior is purely inadvertent; being inadvertent, it is by definition "involuntary."

The appeal of the assumption of risk doctrine lies in grounding responsibility for accidents in a person's choices concerning risk control. And there are at least two perspectives that help illuminate the sign of risk control choices. The first perspective concerns the *reasonableness* of a plaintiff's choice to encounter a risk, which is injected into the concept of voluntariness by defining it in terms of the availability of reasonable alternatives for avoiding the risk, as discussed above. If circumstances force a plaintiff to encounter a defective product condition, then the plaintiff's encounter is not voluntary because of the absence of choice, as discussed above. And because of the

216. *Denton v. Bachtold Bros.*, 291 N.E.2d 229 (Ill. App. Ct. 1972).

217. *Johnson v. Mid-South Distrib., Inc.*, Prod. Liab. Rep. (CCH) ¶ 7984 (Tenn. Ct. App. 1977).

218. *Heil Co.*, 534 S.W.2d at 919.

219. See *Denton*, 291 N.E.2d at 251 (slipping under lawn mower); *Mid-South Distrib., Inc.*, Prod. Liab. Rep. (CCH) ¶ 7984 (catching pant leg in rotating machinery shaft); *Heil Co.*, 534 S.W.2d at 922 (hitting dump truck pullout cable). But see *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 141 (Or. 1976) (activating, inadvertently, control on forklift).

220. See *Nelson v. Brunswick Corp.*, 503 F.2d 376, 383 (9th Cir. 1974) (applying Washington law and stating "the rationale is essentially that when the plaintiff knows and appreciates the danger, he is in a position as good as the defendant's to avoid his injury").

221. See, e.g., *Jackson v. Harsco Corp.*, 673 P.2d 363 (Colo. 1983) (en banc) (relying on reasoning of *Culp v. Rexnord & Booth-Rouse Equip. Co.*, 553 P.2d 844, 845 (Colo. Ct. App. 1976)). The court in *Jackson* stated that "[t]here was . . . no evidence that plaintiff had actual knowledge of the specific dangers arising out of the precise defect asserted, or that he voluntarily and unreasonably proceeded to encounter those dangers despite his awareness of the defect." *Id.* at 367.

absence of choice resulting from the plaintiff being forced into the encounter, the plaintiff's will is removed from a causative analysis of the accident, leaving the manufacturer's sale of a defective product as the last and sole proximate cause of the accident.

The second perspective on a person's risk control choices concerns the *time* when a person decides to encounter a risk. A product user may understand and voluntarily accept a general risk of harm at the time of employment or when a particular project with a product first begins. Yet, at the precise moment a potential accident victim interacts with a product in a manner that erupts into accidental injury, the victim is rarely deliberating upon the nature and degree of risk in, and the desirability of, the specific interaction. Instead, as mentioned earlier, the actual, physical interactions—the “specific” risk encounters—in most situations are inadvertent mistakes, not deliberative choices. To put the matter slightly differently, while persons often voluntarily decide to encounter future risks in a general way, they rarely encounter particular risks voluntarily at the moment of an accident.

It is only when a person's risk encounter is “voluntary” from both the reasonableness and temporal perspectives that the person fairly may be deemed to have assumed the risk. Thus, accidents caused by a plaintiff's *unreasonable* decision to take a truly calculated risk—one that consciously involves the specific physical interaction with the product that results in injury—may be the only type of case in which the assumption of risk defense provides a proper basis for barring recovery. In such situations, where a prudent person would not knowingly and voluntarily act in such a dangerous manner for such a trivial benefit, the doctrine of sole proximate cause could quite easily be substituted for assumption of risk as a mechanism for placing full responsibility upon the plaintiff.²²²

There are at least two contexts in which the courts have been especially open to challenges to the voluntariness of risk encounters: rescues and workplace accidents. In the rescue situation, as with the contributory negligence defense,²²³ a number of courts have held that a rescuer of a person endangered by a defective product may not be barred by the defense of assumption of risk.²²⁴

The second context in which courts are more skeptical of the voluntariness of a plaintiff's risk encounter is the employment setting where a worker is injured by a dangerous industrial machine or other workplace product. For example, in *Rhoads v. Service Machine Co.*,²²⁵ the operator's arm and hand slipped into a large punch press when she lost her balance while activating the press. Upholding the jury's rejection of the assumption of risk defense, despite the plaintiff's knowledge of the unguarded nature of the machine, the court incisively remarked: “The ‘voluntariness’ with which a worker assigned to a dangerous machine in a factory ‘assumes the risk of injury’ from the machine

222. See *supra* Part II (discussing the sole proximate cause doctrine, applicable to both contributory and comparative negligence).

223. See *supra* Part II.

224. See, e.g., *Dillard v. Pittway Corp.*, 719 So. 2d 188, 193-94 (Ala. 1998) (identifying the relevant cases and explaining that neither contributory negligence nor assumption of risk are available as a defense unless rescuer's conduct was “manifestly rash and reckless”).

225. 329 F. Supp. 367, 370 (E.D. Ark. 1971).

is illusory.”²²⁶ Other courts²²⁷ and commentators²²⁸ have agreed that such workplace encounters often are not “voluntary.” The Supreme Court of Ohio has abolished the assumption of risk defense in the workplace setting on the ground that workers often are effectively trapped into performing dangerous activities, a situation which destroys any voluntariness in many such job-related risk encounters.²²⁹

However, some courts continue to treat the voluntariness of encounters in the workplace like any other encounter, sometimes without giving adequate consideration to the propriety of its application in this context,²³⁰ and so apply the assumption of risk defense if deemed warranted on the facts.²³¹ These courts sometimes reason that any compulsion comes not from the defendant

226. *Id.* at 381.

227. *See, e.g.,* *McCalla v. Harnischfeger Corp.*, 521 A.2d 851, 856 (N.J. Super. Ct. 1987) (“[A]n employee engaged in his assigned task . . . has no meaningful choice.” (citations and internal quotations omitted)). Other courts have found the assumption of risk defense improper in the workplace setting on the ground that such encounters are not unreasonable. *See, e.g.,* *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 139-40 (Or. 1976); *Jara v. Rexworks Inc.*, 718 A.2d 788, 795 (Pa. Super. 1998) (2-1 decision). The *Jara* court held that the trial court erred in instructing on assumption of risk and stated:

To suggest that Mr. Jara was required to choose between performing his duties or use the defective product would permit [Defendant], by its own wrong, to deny Mr. Jara the right and privilege of his employment. Therefore, he could not *voluntarily* assume the risk as [Defendant] suggests. Where an employee, in doing a job, is required to use equipment as furnished by the employer, this defense is unavailable. An employee who is required to use certain equipment in the course of his employment and who uses that equipment as directed by the employer has no choice in encountering a risk inherent in that equipment.

Jara, 718 A.2d at 795.

228. *See* Noel, *supra* note 3, at 127. Noel explains:

When an employee consents to work under dangerous conditions, this consent ordinarily is not regarded as effective in a suit against the employer because of the economic pressure involved. It would seem that when a manufacturer supplies a dangerous machine for use by employees, the workman injured because of the unsafe design is subject to comparable economic pressure and that his consent to use the dangerous machine, perhaps in order to retain his job, is likewise not free and voluntary.

Id.; *see also* Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872, 889-90 n.68 (1982) (“It is illogical to prevent the employer from raising the defense of assumption of risk on the ground that the employee lacks freedom of choice, while simultaneously allowing the manufacturer of the product used in the workplace to escape liability on the ground that the employee voluntarily assumed that same risk.” (citation omitted)).

229. *See* *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1207 (Ohio 1991).

230. For example, in *Hedgepeth v. Fruehauf Corp.*, 634 F. Supp. 93 (S.D. Miss. 1986), the driver, whose job required walking on the rounded top of a tanker truck to open hatches, complained that the truck’s top was “real slick and real cruddy” with oil residue and needed to be cleaned. *Id.* at 95, 96. The supervisor ordered him to use the truck anyway, or just to leave. *Id.* at 95. After a delivery, while walking on the top to close a hatch that had been left open, he slipped and fell. *Id.* Although the driver in this case surely knew of the specific risk, the absence of reasonable alternatives—the compulsion to use the product in its hazardous condition in order to work at all—would seem to render his decision to work completely devoid of choice and hence “involuntary.” Yet the court disagreed and held the driver’s actions to be “voluntary.” *Id.* at 99.

231. *See* *Campbell v. Nordco Products*, 629 F.2d 1258 (7th Cir. 1980) (applying Illinois law); *Hedgepeth*, 634 F. Supp. at 99; *Vargus v. Pittman Mfg. Co.*, 510 F. Supp. 116 (E.D. Pa. 1981), *aff’d*, 673 F.2d 1301 (3d Cir. 1981); *Carroll v. Getty Oil Co.*, 498 F. Supp. 409 (D. Del. 1980) *impliedly overruled on other grounds by* *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084 (Del. Super. Ct. 1994); *Alley v. Praschak Mach. Co.*, 366 So. 2d 661, 664 (Miss. 1979).

manufacturer but from a third party, the employer,²³² and that even in this setting workers not infrequently make entirely deliberate (and sometimes entirely foolish) decisions exposing themselves to risks that they fully understand and know to be unreasonable.²³³

D. Assumption of Risk as a Defense to Strict Liability in Tort Claims

While assumption of risk as classically defined is a standard defense to products liability claims brought in negligence, many jurisdictions alter its definition, and a couple alter its availability²³⁴ and effect,²³⁵ in claims for strict liability in tort.²³⁶ *Restatement (Second) of Torts* § 402A comment n, examined above in connection with the contributory negligence defense,²³⁷ provides in part:

[T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.²³⁸

As discussed above,²³⁹ a few states ignored comment n and continued applying the traditional elements of assumption of risk even for claims brought in strict products liability in tort.²⁴⁰ However, especially before the widespread adoption of comparative fault,²⁴¹ many jurisdictions adopted comment n's approach of

232. See, e.g., *Hedgepeth*, 634 F. Supp. at 99 n.3 (relying on RESTATEMENT (SECOND) OF TORTS § 496E cmt. b).

233. See, e.g., *Moran v. Raymond Corp.*, 484 F.2d 1008, 1016 (7th Cir. 1973) (applying Illinois law and finding that worker stuck his arm through moving cross bars on fork lift, activating them). The court in *Moran* stated, "Workmen often take risks which they should not take . . ." *Id.*

234. See, e.g., *Rutter v. Northeastern Beaver County Sch. Dist.*, 437 A.2d 1198, 1209 (Pa. 1981) (explaining that assumption of risk may be abolished as a defense to tort claims generally, but be retained to operate as a bar to claims for strict products liability in tort).

235. Assumption of risk may operate only to reduce damages on a comparative fault basis, except in strict products liability in tort where it may serve as a total bar. See *Bowling v. Heil Co.*, 511 N.E.2d 373, 375 (Ohio 1987); *Onderko v. Richmond Mfg. Co.*, 511 N.E.2d 388, 391 (Ohio 1987).

236. See *Epstein*, *supra* note 3, at 268; *Noel*, *supra* note 3, at 94-95; *Spivey*, *supra* note 121, at §§ 4, 5 (contributory negligence and assumption of risk as defenses to claim for strict products liability in tort); *Twerski*, *supra* note 149, at 2; *Vargo*, *supra* note 121, at 448.

237. See *supra* Part II (discussing comment n in full).

238. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

239. See *supra* Part II.

240. See *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 74 (Neb. 1987); see also CONN. GEN. STAT. ANN. § 52-572l (1991) ("Nothing in this section shall be construed as barring . . . the defense of knowingly using the product in a defective condition in an action based on strict tort liability.").

241. After the adoption of comparative fault, many (but not all) jurisdictions saw no need to distinguish between forms of plaintiff fault and so included all forms of plaintiff misconduct in the comparative calculus. See generally SCHWARTZ, *supra* note 5, ch. 11-1 (explaining the interface of strict liability and comparative fault); 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 15.

restricting the availability of the assumption of risk defense in strict products liability in tort to cases of *unreasonable* ("negligent"²⁴²) assumptions of risk.²⁴³ In effect, such jurisdictions add an additional element—unreasonableness—onto the traditional elements which comprise the assumption of risk defense as applied to claims of negligence. So altered, the assumption of risk defense to claims for strict products liability in tort requires that a plaintiff know and appreciate the risk, that he or she voluntarily encounter it, and that the plaintiff's decision to encounter it be unreasonable.²⁴⁴

As with the issue of voluntariness discussed above, some courts have stressed that workplace decisions to encounter risk may be found not to be "unreasonable" if the practical demands of the job sabotage an opportunity for truly consensual decisionmaking about such encounters.²⁴⁵ Although there is

242. See, e.g., *Egelhoff v. Holt*, 875 S.W.2d 543, 548-49 (Mo. 1994) (en banc) (using "negligent assumption of risk" expression, but applying it to wrong statutory provision).

243. Some of the earlier cases adopting this approach include *Johnson v. Clark Equipment Co.*, 547 P.2d 132, 138 (Or. 1976); *Ferraro v. Ford Motor Co.*, 223 A.2d 746, 748 (Pa. 1966); and *Haugen v. Minnesota Min. & Mfg. Co.*, 550 P.2d 71, 75 (Wash. Ct. App. 1976). South Carolina did so by adopting a key sentence of comment *n* statutorily. S.C. CODE ANN. § 15-73-20 (Law. Co-op. 1976). More recent adoptions, applications, and statements of this principle include *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 864 (Ariz. 1995); *Jackson v. Harsco Corp.*, 673 P.2d 363, 366 (Colo. 1983) (en banc); *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1275 (D.C. 1995); *Deere & Co. v. Brooks*, 299 S.E.2d 704, 706 (Ga. 1983); and *Berg v. Sukup Manufacturing Co.*, 355 N.W.2d 833, 835 (S.D. 1984).

In *Clark Equipment Company* the court explained:

The concept of assumption of risk in a products liability case differs somewhat from the traditional tort doctrine of assumption of risk. . . . In contrast to the more traditional defense which includes only two elements—subjective knowledge and voluntary encounter—Comment *n* sets forth three elements which must be shown before the plaintiff can be barred from recovery. The defendant must show, first, that the plaintiff *himself* actually knew and appreciated the particular risk or danger created by the defect; second, that plaintiff voluntarily encountered the risk while realizing the danger; and, third, that plaintiff's decision to voluntarily encounter the known risk was unreasonable.

Clark Equip. Co., 547 P.2d at 138. Cf. *Milwaukee Elec. Tool Corp. v. San Diego Cty. Super. Ct.*, 6 Cal. Rptr. 2d 423, 431 (Ct. App. 1992) (stating that to bar recovery for breach of warranty, jury must find that plaintiff used product after discovering defect and that a reasonable person would not have used product knowing of its condition); *Allen v. Chance Mfg. Co.*, 494 N.E.2d 1324, 1326 (Mass. 1986) (stating that plaintiff must have actual knowledge to recover for breach of implied warranty).

244. See, e.g., *Berg v. Sukup Mfg. Co.*, 355 N.W.2d 833, 835 (S.D. 1984). In *Berg* the court, citing *Restatement (Second) of Torts* § 402A cmt. n, observed:

In applying the doctrine of assumption of the risk to products liability cases the Restatement (Second) of Torts § 402A (1965) requires that . . . the manufacturer must show:

- (1) That the plaintiff knew and appreciated the risk or danger created by the defect,
- (2) that the plaintiff voluntarily encountered the risk while realizing the danger, and
- (3) that the plaintiff's decision to voluntarily encounter the risk was unreasonable.

Id.

245. See, e.g., *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969) ("It could never be said as a matter of law that a workman whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same."); *Clark Equip. Co.*, 547 P.2d at 140-41. The *Clark Equipment* court reasoned:

[W]orking conditions and related circumstances are a particularly relevant consideration in an inquiry into the reasonableness of a decision to encounter a job-related danger. Such factors often will have a strong

very little recent law on point, it would seem quite clear that, even in the workplace context, a person may unreasonably (and voluntarily) choose to engage a known and appreciated risk.²⁴⁶

The reasonableness issue in strict liability in tort cases concerns the plaintiff's *decision* to encounter a particular risk, or to encounter it in a particular way, not the reasonableness of the physical execution of that decision.²⁴⁷ Unlike the other elements of assumption of risk, the unreasonableness element adds an *objective* determination of whether a prudent person would have decided to encounter the particular risk based on all the surrounding circumstances.²⁴⁸

While adding an "unreasonableness" requirement to the definition of assumption of risk for strict liability in tort claims formally narrows and restricts the availability of the defense, and while it may provide a plaintiff's lawyer with a convenient peg on which to hang an argument, the effect of this element may be more apparent than real. No doubt it is true that the orthodox definition of assumption of risk does not require that a plaintiff's choice to incur a known risk be unreasonable, so that the defense may theoretically arise even if an encounter was reasonable in all respects.²⁴⁹ However, if the "voluntary" element of assumption of risk is defined as the absence of reasonable alternatives, as discussed above, the set of reasonable assumptions of risk essentially disappears.

Assume, for example, that a pregnant woman living deep in the country goes into labor, and her doctor counsels her by telephone that complications in her pregnancy threaten her life if she does not immediately begin to drive to the distant hospital. When her husband helps her into their only car, he first notices a large bubble defect that has formed on the sidewall of a newly purchased front tire on the car. Being a tire salesman, he knows that the bubble may cause the tire to fail at any time. However, because there are no neighbors, nor time to call an ambulance, the husband proceeds to drive slowly and carefully to the hospital. But the tire bursts en route, causing the car to careen into a ditch,

influence on that decision, and, in some cases, they may represent the most important motivational factors. For example, a worker might fear that a slowdown in his individual production would slow down the entire production team and thereby draw the attention of his boss. If he has a history of such slowdowns, or of causing excessive spoilage or ruining machine parts, he may have good cause to fear dismissal. The job market could be tight, and he may have little hope of being able to find a new job. Moreover, the situation may demand an immediate, hurried decision. It is certainly possible that, under such circumstances, a reasonable jury could find that his decision to encounter a known risk was not unreasonable.

Id.; see also *Berg*, 355 N.W.2d at 835-36 (explaining that working conditions are relevant in determining the reasonableness of a decision).

246. See, e.g., *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973) (applying Illinois law). In *Moran* the plaintiff, to avoid getting back inside the operator's cage, reached from outside a forklift between the horizontal cross bars to engage the throttle, lowering a cross bar upon his arm which he could not extract in time. *Id.* This case presents a good example, although the court did not there examine the reasonableness of the plaintiff's conduct or decision.

247. See *Clark Equip. Co.*, 547 P.2d at 140 ("We are not concerned with the apparent reasonableness or unreasonableness of the physical conduct through which plaintiff encountered the danger, but rather the reasonableness of his decision to do so.")

248. See *id.* at 138 n.5.

249. See, e.g., *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 74 (Neb. 1987) (stating that assumption of the risk negates liability even if plaintiff acts with due care). See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 481.

injuring the husband. No doubt a jury would find that the husband's decision to incur the risk of driving on the defective tire was reasonable, and quite probably that it was informed. But the decision to incur this risk was not voluntary; it was reasonable for the very same reason that it was involuntary—the husband had no choice, no reasonable alternative to attempting the journey on a tire he knew to be dangerously defective.

Thus, if voluntariness means the absence of choice, and choice means the availability of reasonable alternatives, voluntariness and reasonableness may be seen to collapse into one another, rendering the notion of a reasonable assumption of risk a contradiction in terms and a virtually empty set.²⁵⁰ In the problem above, the husband would be protected from an assumption of risk defense because his choice to incur the risk was reasonable, but he would avoid it as well because the decision was involuntary. These results would be reversed if the husband had no good reason to drive on the defective tire, that is, if a reasonable alternative were available. So, if the husband chose to drive to a baseball game on the defective tire, failing to take time to change the tire with an available spare in order to arrive earlier and get a better parking space, then his choice to incur the risk would be voluntary, his decision would also be unreasonable, and his assumption of risk would bar recovery. Either way, because reasonableness is bound up in the notion of voluntariness, adding the unreasonableness of a decision to encounter a risk as a formal element to assumption of risk may not materially alter the scope of the defense.²⁵¹

E. Reform

Assumption of risk is on the run. The doctrine is plainly problematic: it may unfairly place responsibility for injuries upon a victim whose only fault lay in making a choice, perhaps correctly, that was forced improperly upon him by a tortfeasor. To the extent that a plaintiff truly was at fault in encountering a risk, the doctrines of (no) duty,²⁵² contributory (and comparative) negligence,²⁵³ and (sole) proximate causation²⁵⁴ would appear to cover virtually every case where assumption of risk properly bars recovery. For these reasons, the

250. "Virtually empty" is more accurate than "completely so" because the risks and other costs of an alternative course of action may be equal to, rather than less than, those of the course of action encountered. In such a case, either decision would be reasonable.

251. See, e.g., *Berg v. Sukup Mfg. Co.*, 355 N.W.2d 833 (S.D. 1984). In *Berg* the court, applying the unreasonableness element of *Restatement (Second) of Torts* § 402A cmt. n, defined the element in terms of the presence of a reasonable alternative, a standard more typically used to define voluntariness. *Id.* at 835. The court remarked: "Reasonableness refers to whether the plaintiff had a reasonable opportunity to elect whether or not to subject himself to the danger." *Id.* at 835. The court further stated the issue in terms of "[w]hether or not [plaintiff] had a reasonable opportunity to avoid the risk." *Id.* at 836.

252. See, e.g., *Barkewich v. Billenger*, 247 A.2d 603, 605-06 (Pa. 1968) (finding that manufacturer of glass breaking machine had no duty to design machine to prevent operators from reaching their hands in machine in an attempt to release a jam).

253. See generally 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 15.

254. See, e.g., *Horton v. American Tobacco Co.*, 667 So. 2d 1289, 1307 (Miss. 1995) (Lee, P.J., concurring and dissenting in part) ("Under assumption of the risk theory, if a plaintiff is found to have assumed the risk of his own injury, he is, in fact, the sole proximate cause of his injury and thus, no liability lies on the defendant . . .").

assumption of risk defense has long been roundly criticized,²⁵⁵ and it is being abolished, partially²⁵⁶ or completely,²⁵⁷ by an increasing number of courts and legislatures. And, with the widespread adoption of the comparative fault doctrine beginning in the 1960s, other courts and legislatures have done what amounts to the same thing by "merging" assumption of risk into a broad doctrine of comparative fault.²⁵⁸ In many of the remaining states which continue

255. The critical scholarly literature includes Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); Flemming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); Simons, *supra* note 149 (excellent theoretical inquiry); and John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961). See also 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 21.8, at 259 (2d ed. 1986); PROSSER & KEETON ON TORTS, *supra* note 50, at 493-95. For an interesting debate among the tort law scholars of an earlier generation, see "The Battle of the Wilderness," in RESTATEMENT (SECOND) OF TORTS § 893, at 70 (Tent. Draft No. 9, 1963).

256. For example, a few jurisdictions have abolished the implied assumption of risk defense in all cases except those involving claims of strict products liability in tort. See, e.g., Cent. Tel. Co. v. Fixtures Mfg. Corp., 738 P.2d 510, 512 (Nev. 1987) (assumption of risk absorbed into comparative fault act except in strict liability cases); Bowling v. Heil Co., 511 N.E.2d 373, 377 (Ohio 1987); Onderko v. Richmond Mfg. Co., 511 N.E.2d 388, 392 (Ohio 1987); Rutter v. Northeastern Beaver County Sch. Dist., 437 A.2d 1198, 1209 n.5 (Pa. 1981) (noting that nineteen other jurisdictions that have abolished or "seriously modified" the defense, and concluding that "the difficulties of using the term 'assumption of risk' outweigh the benefits").

At least Connecticut accomplishes the same result statutorily. Compare CONN. GEN. STAT. § 52-572h(1) (1991 & Supp. 1999) (abolishing the doctrine of assumption of risk in negligence actions) with CONN. GEN. STAT. § 52-572l (1991) ("Nothing in this section shall be construed as barring . . . the defense of knowingly using the product in a defective condition in an action based on strict tort liability.").

257. New Jersey was the first such state to do so. See McGrath v. Am. Cyanamid Co., 196 A.2d 238, 240 (N.J. 1963); Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). See also Bolduc v. Crain, 181 A.2d 641 (N.H. 1962); Hornbeck v. Western States Fire Apparatus, Inc., 572 P.2d 620, 622 (Or. 1977).

The Ohio court abolished the defense for risks encountered by workers in the normal performance of their job-related duties. See Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203, 1207 (Ohio 1991).

New Jersey, which abolished the doctrine, had an interesting struggle dealing with aggravated user misconduct in products liability cases without this defense. Its solution was to recognize "a defense of contributory negligence to strict liability in tort based upon a voluntary and unreasonable encountering by the plaintiff of a known safety hazard of a machine where proximately contributive to the accident." Cepeda v. Cumberland Eng'g Co., 386 A.2d 816, 833 (N.J. 1978), *overruled on other grounds by* Sutter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979). Under New Jersey's system of comparative fault, this is now the only type of plaintiff misconduct that may be used to reduce damages. See, e.g., Lewis v. Am. Cyanamid Co., 715 A.2d 967, 974-76 (N.J. 1998).

258. See, e.g., Larsen v. Pacesetter Sys., Inc., 837 P.2d 1273 (Haw. 1992) (stating that assumption of risk bar, "absurd" in products liability setting, merged into comparative fault); Calderon v. Echo, Inc., 614 N.E.2d 140 (Ill. App. Ct. 1993) (stating that since landscaper, contrary to instructions, failed to wear safety goggles while operating trimmer-brush-cutter, he was 90% at fault); Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984); Zahrtre v. Sturm, Ruger & Co., 661 P.2d 17 (Mont. 1983) (Gulbrandson, J., dissenting); Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994) (abolishing implied assumption of risk; fault aspects included in comparative fault); South v. A.B. Chance Co., 635 P.2d 728 (Wash. 1981) (7-2 decision); Blackburn v. Dorta, 348 So. 2d 287, 292-93 (Fla. 1977). In *Blackburn* the court explained:

We find no discernible basis analytically or historically to maintain a distinction between the affirmative defense of contributory negligence and assumption of risk. . . . [Would the fault principles of tort law and comparative negligence be advanced by] a doctrine which would totally bar recovery by one who voluntarily, but reasonably, assumes a known risk while one whose conduct is unreasonable but denominated "contributory

to apply the assumption of risk defense, courts not infrequently recognize its harshness²⁵⁹ and, refusing to apply it except where clearly mandated by facts and precedent, proclaim that it will not be extended.²⁶⁰

The principal *theoretical* benefit of the assumption of risk doctrine is that it grounds the law on choice and so ties legal responsibility at least in part to this important philosophic value. But a manufacturer's choices usually are relevant to product accidents as well, and a manufacturer should not necessarily escape all responsibility for accidents when it designs and sells a product that may force consumers to confront difficult choices subjecting themselves to risk. If a product defect leaves a user with no choice of an effective way to avoid a risk of harm, then the manufacturer fairly should shoulder the entire loss. But if a plaintiff knowingly, affirmatively, and unreasonably exercises substantial control over a product hazard, and simply opts to take a calculated and unreasonable risk, then the plaintiff's decision and action—whether viewed as choice or fault or both—should usually be considered the sole proximate cause of any resulting harm. Finally, if moral responsibility for a product accident is divided between the choices and conduct of both parties, then comparative fault provides a sound system for dividing damages. Basing responsibility on choice is a two-way street, and it would seem that a system of comparative responsibility generally offers a better method for doing justice when a product user assumes a risk of injury.

Probably the most important *practical* benefit of the assumption of risk doctrine is to provide a basis for summary judgment when a plaintiff is shown to have knowingly engaged an unreasonable risk and so should bear full responsibility for his or her injuries. Although courts are understandably shy to apply comparative fault principles to grant summary judgment against faulty plaintiffs, it would seem that courts might appropriately provide a small window for granting defendants summary judgment when a plaintiff's fault can fairly be characterized as the sole proximate cause of an accident.²⁶¹ This will often be the case when the facts are clear that the plaintiff knowingly and unreasonably took a calculated risk that resulted in accidental harm.

In conclusion, while the assumption of risk doctrine's grounding in choice theory renders it alluring at some levels, a complete choice theory requires consideration not only of a plaintiff's choices, but of a manufacturer's choices, too. Viewed from a welfare or economic perspective, the doctrine's mischief

negligence" is permitted to recover a proportionate amount of his damages for injury? Certainly not. Therefore, we hold that the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence and the principles of comparative negligence . . . shall apply . . .

Id. at 292-93.

259. See, e.g., *Forrest City Mach. Works, Inc. v. Aderhold*, 616 S.W.2d 720, 724 (Ark. 1981) (stating that assumption of risk is a "harsh doctrine").

260. See, e.g., *Heil Co. v. Grant*, 534 S.W.2d 916, 920 (Tex. Civ. App. 1976) (applying it to facts, but stating, "The doctrine of assumed risk is harsh and will not be extended.").

261. While courts in pure comparative fault jurisdictions might reasonably be more cautious in so ruling, courts in modified (50%) comparative fault jurisdictions should more often confront situations appropriate for granting summary judgment motions on assumption of risk in favor of defendants. Even in pure comparative fault states, however, a plaintiff's extraordinary misconduct may sometimes authorize summary judgment for the defendant.

quite clearly outweighs its benefits.²⁶² And, viewed on its own terms, courts and legislatures increasingly appreciate the shortcomings of the assumption of risk defense and recognize the availability of reasonable alternative doctrines that fill the void well. Now that the new *Restatement of Apportionment* has taken the position that assumption of risk as a separate doctrine should be abolished,²⁶³ the trends toward abolishing the doctrine and merging it into comparative fault appears inexorable. No doubt assumption of risk will linger on in some jurisdictions for some time, yet it clearly is a doctrine that is doomed.

F. *Express Assumption of Risk*

The discussion above pertains to *implied* assumption of risk, in which context a plaintiff's conduct suggests or implies consent to incur a risk.²⁶⁴ The issues are quite different when a defendant claims that a product user *expressly* agreed to accept full responsibility for the possibility that the use of a product would result in an injury—usually by means of a written waiver or disclaimer signed by the plaintiff. The principles of express assumption of risk depend upon the theory of recovery: negligence, strict products liability in tort, or warranty.

In negligence, the products liability cases parallel the general tort law principles: a disclaimer is effective only if it clearly and unequivocally relieves the defendant of responsibility for harm caused by the defendant's negligence. To most courts this has meant that the word "negligence" or "fault" (rather than more general words such as "liability") must appear in the disclaimer provision in a manner that makes it entirely clear that the shift of responsibility between the parties includes a shift of liability for harm caused by the defendant's negligence.²⁶⁵ The negligence disclaimer cases have usually involved commercial parties suffering commercial losses, but the few that have involved garden-variety consumer claims against manufacturers for personal injuries caused by defective products follow similar principles of limitation, as explained below.

Several courts have held that a disclaimer is void if the defendant's negligence resulted in a violation of a duty imposed by statute for the benefit

262. See, e.g., *Rutter v. Northeastern Beaver County Sch. Dist.*, 437 A.2d 1198, 1209 (Pa. 1981) (abolishing implied assumption of risk defense, except for strict tort products liability, on grounds that "the difficulties of using the term 'assumption of risk' outweigh the benefits").

263. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 2 cmt. i, 3 cmt. c (2000).

264. See PROSSER & KEETON ON TORTS, *supra* note 50, § 68.

265. See, for example, *Willard Van Dyke Productions, Inc. v. Eastman Kodak Co.*, 189 N.E.2d 693 (N.Y. 1963), and *Posttape Associates v. Eastman Kodak Co.*, 387 F. Supp. 184, 186 (E.D. Pa. 1974), *rev'd on other grounds*, 537 F.2d 751 (3d Cir. 1976) (against the same defendant as in *Willard Van Dyke* on nearly identical facts, where the disclaimer, which was redrafted in an attempt to comply with *Willard Van Dyke's* requirements, was found still inadequate).

of the public.²⁶⁶ As under the principles of warranty law,²⁶⁷ the plaintiff must be made aware of a disclaimer of negligence responsibility at the time of sale, and such a provision will be ineffective if it is buried in fine print in an owner's manual not given to plaintiff until after sale.²⁶⁸ Even if a products liability defendant effectively avoids negligence responsibility toward the user who signed the contractual disclaimer, such a provision will not bar a negligence action brought by an injured third party against the manufacturer or other seller.²⁶⁹

As for strict products liability in tort, the law is clear: a seller's attempt to disclaim responsibility to consumers for injuries from new products is against public policy, void, and of no effect. Indeed, the untoward use of disclaimers by sellers of dangerously defective consumer goods, allowable under warranty law, was a principal reason for the development of the doctrine of strict products liability in tort in the 1960s.²⁷⁰ Both the *Second*²⁷¹ and *Third Restatements of Torts*²⁷² agree that such disclaimers of responsibility for injuries caused by product defects violate the law and are thus invalid.²⁷³ Most of the difficult problems with disclaimers in strict tort involve their effectiveness in commercial contexts involving economic losses, a topic examined elsewhere.²⁷⁴

A typical case illustrating the prevailing tort law principles is *Diedrich v. Wright*,²⁷⁵ in which the plaintiff was severely injured when her parachute failed to open fully because its lines were crossed. In her suit against the parachute center for supplying her with an unsafe parachute, the defendant asserted that she had waived her rights by signing a release form that generally exculpated the defendant from liability for injuries from parachuting. The court held that

266. See, e.g., *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 454 S.W.2d 307, 310 (Ark. 1970) (stating that a seed grower could not limit liability, by disclaimer, when the certification on the seeds was required by statute and when the certification created great reliance).

267. See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, §§ 4:12--19 (discussing warranty disclaimers and limitations).

268. See *Omni Flying Club, Inc. v. Cessna Aircraft Co.*, 315 N.E.2d 885, 888 (Mass. 1974).

269. See *Blanchard v. Monical Mach. Co.*, 269 N.W.2d 564, 566 (Mich. Ct. App. 1978) (involving an "as is" sale of used machine from defendant to plaintiff's employer).

270. See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, §§ 5.2, 5.3.

271. RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965) ("The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement . . .").

272. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1998) provides: "Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons."

273. See, e.g., *McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp.*, 647 N.E.2d 355 (Ind. Ct. App. 1995) (stating that under common law and statute patterned substantially after § 402A manufacturer is prohibited from disclaiming or limiting liability); *Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 737 (D. Haw. 1993).

274. See 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, § 17:13. See generally William J. McNichols, *Who Says that Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree*, 28 OKLA. L. REV. 494 (1975); Stephen C. Parker, Note, *The Warranty Disclaimer v. Manufacturers' Products Liability—Stern Aero AB v. Page Airmotive, Inc.: Did the Tenth Circuit Bury the Disclaimer Alive?*, 10 TULSA L.J. 612 (1975).

275. 550 F. Supp. 805, 806 (N.D. Ill. 1982).

the release could not bar a strict liability action and that it did not bar the negligence action because it failed clearly to state that the plaintiff was relieving the defendant of liability for *negligence*.²⁷⁶

In warranty law, disclaimers are addressed by § 2-316 of the *Uniform Commercial Code*. The commercial code law on disclaimers is treated extensively elsewhere.²⁷⁷ Basically, disclaimers are allowed under state law, provided they are clearly made pursuant to the requirements of the Code, but their use is substantially restricted by federal law in significant consumer goods transactions.²⁷⁸

G. Fireman's rule

One special, narrow doctrine that concerns assumption of risk in its "primary" or no-duty sense²⁷⁹ is the "fireman's rule," now sometimes called the "firefighters' rule," which applies to firefighters, police officers, and other professionals trained to rescue and preserve persons and property in emergency situations.²⁸⁰ Most states hold that such emergency professionals, such as a firefighter injured in fighting a fire, may not recover against a party who tortiously caused the fire or other exigency because the firefighter is deemed to have assumed the normal risks incident to the job.²⁸¹ But the fireman's rule generally will not apply, and so will not bar recovery, if the product's defective condition does not cause the fire or other emergency situation which provided the need for the plaintiff's professional skills.²⁸²

276. Cf. *Ghionis v. Deer Valley Resort Co.*, 839 F. Supp. 789, 797 (D. Utah 1993) (finding, notwithstanding release, that skier was not aware that her rented bindings would fail to release because they were incompatible with her boots); *Westlye v. Look Sports, Inc.*, 22 Cal. Rptr. 2d 781, 790 (Ct. App. 1993) (holding that ski equipment rental disclaimer against public policy); *Moore v. Sitzmark Corp.*, 555 N.E.2d 1305, 1307 (Ind. Ct. App. 1990) (holding that skier's signature on release simply acknowledged laws of physics and did not show she knew of defect in bindings). But see *Johnson v. Paraplane Corp.*, 319 S.C. 247, 254, 460 S.E.2d 398, 402 (Ct. App. 1995) (finding that release and video fully explained nature and assumption of risks of flying ultralight aircraft).

277. See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 4:21.

278. See generally *id.* § 4:23.

279. See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 68, at 481 n.10.

280. See generally *id.* § 61, at 429.

281. See, e.g., *Brown v. General Elec. Corp.*, 648 F. Supp. 470 (M.D. Ga. 1986) (finding that fireman, who was fighting fire caused by defective coffee pot, was injured from jumping off roof of burning building that exploded).

282. See *McKernan v. General Motor Corp.*, 3 P.3d 1261 (Kan. 2000) (holding that since firefighters were injured while fighting a car fire caused by explosion of gas filled strut that supported hood, firefighter could maintain products liability action against automaker; firefighter's rule did not bar suit); *Labrie v. Pace Membership Warehouse, Inc.*, 678 A.2d 867, 868 (R.I. 1996) (concluding that where fire department employee was injured by waterline valve during routine inspection of merchant's sprinkler system, "the Superior Court responded to a false alarm when it used the firefighter's rule to torch plaintiff's complaint"); *Hauboldt v. Union Carbide Corp.*, 467 N.W.2d 508 (Wis. 1991) (holding that doctrine did not apply when defective acetylene tank exploded, directly injuring firefighter). But see *White v. Edmond*, 971 F.2d 681 (11th Cir. 1992) (holding that doctrine barred recovery when firefighter injured when car's shock absorbers exploded in fire).

IV. MISUSE

A. *In General*

A user's "misuse" of a product, putting it to a clearly improper use, generally bars recovery in a products liability action.²⁸³ Thus, like assumption of risk, product misuse is a powerful common law "misconduct defense" in products liability litigation.²⁸⁴ Although a few jurisdictions have merged misuse into the comparative fault system,²⁸⁵ so that some or all forms of product misuse serve only to reduce a plaintiff's damages rather than to bar recovery altogether, a user's²⁸⁶ *unforeseeable* misuse is widely considered to be an absolute bar to recovery.²⁸⁷ While product misuse is a common law doctrine,²⁸⁸ products

283. See generally William D. Dale & Frank H. Hilton, Jr., *Use of the Product—When is it Abnormal?*, 4 WILLAMETTE L. REV. 350 (1967); David A. Fischer, *Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk*, 43 MO. L. REV. 643 (1978); McNichols, *supra* note 121 (providing comprehensive review and consideration of early draft of Third Restatement); Noel, *supra* note 3; Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978) [hereinafter Twerski, *The Many Faces of Misuse*]; Vargo, *supra* note 121; Comment, *Torts-forseeability-Manufacturer Held Liable for Injury Caused by Unintended Use*, 42 N.Y.U. L. REV. 381 (1967). On related regulatory issues, see Robert S. Adler, *Redesigning People versus Redesigning Products: The Consumer Product Safety Commission Addresses Product Misuse*, 11 J. L. & POL. 79 (1995); David E. Gardel, Note, *Overuse in Products Liability*, 57 NEB. L. REV. 817 (1978); Randy R. Koender, Annotation, *Products Liability: Product Misuse Defense*, 65 A.L.R. 4th 263 (1988) (providing comprehensive treatment of misuse "defense" in products liability).

284. While product misuse is a common law doctrine, statutory reform provisions in many states govern the effect of various forms of user misconduct including misuse. For a discussion of such statutes, see *supra* Part I.

285. See *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 870 (Ariz. 1995); *Mauch v. Mfrs. Sales & Serv., Inc.*, 345 N.W.2d 338, 348 (N.D. 1984); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977), *overruled on other grounds by Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), and by *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). See generally Fischer, *supra* note 283; McNichols, *supra* note 121; Twerski, *The Many Faces of Misuse*, *supra* note 283.

286. This Article addresses the role of product misuse as a user misconduct "defense." Misuse by a third party (including product alteration and modification) raises issues of intervening (and possibly superseding) causation and so is generally treated as part of the topic of proximate causation. See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, at ch. 13; Frederick E. Felder, Annotation, *Products Liability: Alteration of Product After It Leaves Hands of Manufacturer or Seller as Affecting Liability for Product-Caused Harm*, 41 A.L.R.3d 1251 (1972).

287. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. p, reporters' note (1998). While the Uniform Comparative Fault Act includes *foreseeable* misuse as a form of "fault" subject to comparison, this means that *unforeseeable* misuse remains outside of the comparative system as a total bar to liability. See *supra* Part I.

288. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. p, reporters' note (1998).

liability reform statutes in several states reduce damages²⁸⁹ or bar liability²⁹⁰ in cases of a plaintiff's misuse.²⁹¹

The basic idea of the misuse doctrine is that products are necessarily designed to do certain limited tasks, within certain limited environments of use, and that no product can be made safe for every purpose, manner, or extent of use. Considerations of cost and practicality limit every product's range of effective and safe use, which is a fundamental fact of life that consumers readily understand. Consumers know that products may be used safely only for certain limited purposes, that they should be used properly and within the manufacturer's warnings and instructions, and that the use of a product beyond its capabilities may cause it to break, overheat, or otherwise fail in a possibly dangerous way. If a user chooses to put a product to a type or manner of use that the product cannot fairly be expected to withstand, and the user is injured as a result,²⁹² he or she cannot reasonably demand that the manufacturer (and, indirectly, other consumers) shoulder the economic consequences of the loss.²⁹³ "We cannot charge the manufacturer of a knife when it is used as a toothpick and the user complains because the sharp edge cuts."²⁹⁴

289. At least Idaho and Missouri have enacted such legislation, and this is the approach of the Uniform Comparative Fault Act which reduces a plaintiff's damages, however, only on account of *foreseeable* product misuse. See *supra* note 38.

290. At least Arizona, Indiana, Michigan, Montana, and Tennessee have such statutes. See *supra* note 39. The Montana Supreme Court has interpreted that state's ambiguous statute to mean that unforeseeable misuse bars liability. See *Hart-Albin Co. v. McLees Inc.*, 870 P.2d 51, 53-54 (Mont. 1994).

291. The statutes use various labels to describe this form of plaintiff misconduct. See, e.g., MONT. CODE ANN. § 27-1-719(5)(b) (1999) (citing unreasonable misuse as a defense to strict liability).

292. See, e.g., *Cavanagh v. F.W. Woolworth Co.*, 32 N.E.2d 256 (Mass. 1941) (suggesting that the plaintiff was demanding more from a rubber bottle stopper than he could fairly expect).

293. See, e.g., *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 192 (1st Cir. 1980) (applying Massachusetts law). See generally *Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Or. 1973) ("Misuse, to bar recovery, must be a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for."); Alden D. Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 89 (1973). In his article, Holford explains:

If a consumer employs a product in some extraordinary manner, and encounters a known danger in the course of his conduct, the doctrine of product misuse will bar recovery from the manufacturer. The adventurous consumer has voluntarily placed himself in a category distinct from the normal consumer who forgoes the pleasure and convenience of using products in novel but dangerous ways. The rationale of loss distribution does not reach his case because it is unfair to force consumers who forgo these additional benefits to subsidize those individuals who voluntarily take the additional risks. . . . [The misuse defense] fall[s] into the general category of assumption of risk.

Id. (footnotes omitted). See generally David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 476 (1993) (A consumer who puts a "product to a uniquely adventuresome use that he should know may exceed the product's capabilities . . . has no fair claim to compensation from the maker, diminishing the autonomy of the maker's owners and other consumers, because the accident was caused by the victim's greed in demanding greater usefulness from the product than other consumers sought and greater usefulness than was reflected in the price he paid.").

294. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349 (Tex. 1977), *overruled on other grounds by Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), and *by Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

The misuse doctrine is difficult to apply in a principled manner, as discussed below, but the general doctrine is quite easy to state: manufacturers and other sellers are subject to responsibility for harm from product uses which are reasonably foreseeable but not for harm from unforeseeable product use.²⁹⁵

B. Development of the Doctrine and Availability as a Bar to Various Liability Claims

The misuse doctrine runs long and deep through products liability law, having shielded manufacturers from liability for at least a century.²⁹⁶ For most of the twentieth century, the role of a user's misuse of a product in a personal injury action against the supplier was unclear. Many early courts simply treated product misuse as an issue going to proximate cause.²⁹⁷ Other courts viewed misuse as limiting the seller's liability to the product's "intended" uses. For example, users in early cases were barred from recovery on claims that cleaning fluid was intended to be applied to inanimate objects, not splashed in the eye;²⁹⁸ that the entire edge of a grinding wheel was intended to be applied against the object being ground, not just the edge of the edge;²⁹⁹ and that allegedly uncrashworthy automobiles were intended to be driven on the highway, not for crashing into trees.³⁰⁰ In the 1950s and 1960s, courts and commentators increasingly framed the issue as whether the user had put the product to an "abnormal" use,³⁰¹ although the "intended" use formulation of the misuse principle continued to linger on in some jurisdictions.³⁰² Through much of the 1960s and 1970s, and even into the 1980s, as the role of product misuse

295. See, e.g., *Jurado v. Western Gear Works*, 619 A.2d 1312, 1318 (N.J. 1993) ("[A] manufacturer is not under a duty to protect against unforeseeable misuses" yet it "has a duty to prevent an injury caused by the foreseeable misuse of its product."); cf. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. p., reporters' note (1998) ("When a product is put to an unforeseeable use and the plaintiff claims that the product should have been designed to avoid injury when put to such a use, the courts agree that liability will not attach."); *Armentrout v. FMC Corp.*, 842 P.2d 175, 188 (Colo. 1992) (en banc) ("[R]egardless of the defective condition of a product, misuse by an injured party which cannot be reasonably anticipated by the manufacturer is a defense where that conduct actually caused the injury.").

296. "It seems quite clearly established where the purchaser, actually knowing the defective nature of the article, puts it to a use for which it is unfit and unsafe, any injury received therefrom is due to his misuse and not to the act of him who created the defect." Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 337, 343 (1905).

297. See, e.g., *Waterman v. Liederman*, 60 P.2d 881, 883 (Cal. App. 1936) (finding that wild driving on tire is a proximate cause issue). See generally William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 824 (1966).

298. *Sawyer v. Pine Oil Sales Co.*, 155 F.2d 855 (5th Cir. 1946) (applying Louisiana law). See RESTATEMENT (SECOND) OF TORTS § 395 cmt. j. But see *Haberly v. Reardon Co.*, 319 S.W.2d 859, 864 (Mo. 1958) (stating paint may foreseeably enter an eye and cause blindness).

299. *Zesch v. Abrasive Co.*, 193 S.W.2d 581, 584 (Mo. 1946).

300. *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966) (applying Indiana law), *overruled by Huff v. White Motor Corp.*, 565 F.2d 104, 109 (7th Cir. 1977); see also *General Motors Corp. v. Muncy*, 367 F.2d 493 (5th Cir. 1966) (applying Texas law). *Contra Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). The crashworthiness doctrine is addressed in 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, § 21:3.

301. See generally PROSSER & KEETON ON TORTS, *supra* note 50, at 668; Noel, *supra* note 3, at 95.

302. See, e.g., *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963); *Myers v. American Seating Co.*, 637 So. 2d 771, 775 (La. Ct. App. 1994); *Allen v. Chance Mfg. Co.*, 494 N.E.2d 1324, 1326 (Mass. 1986); *Codling v. Paglia*, 298 N.E.2d 622, 628 (N.Y. 1973); *Bazerman v. Gardall Safe Corp.*, 609 N.Y.S.2d 610, 611 (App. Div. 1994).

evolved and began to come into focus, all three terms and concepts—intended use, abnormal use, and misuse—shared an uncomfortable coexistence.³⁰³ By the 1980s and 1990s, however, the courts and commentators had worked out a generally accepted definition of the “misuse” doctrine: liability is restricted to the consequences of reasonably “foreseeable” use—a formulation that widely prevails in products liability litigation today.

Although the precise formulation of the product misuse doctrine was still in ferment in many jurisdictions late into the twentieth century, the correlative ideas of restricting a seller’s responsibility to normal or expectable product uses, on the one hand, and making users responsible for their injuries caused by particularly unusual product uses, on the other hand, have been central pillars of products liability law for many years. The *Restatement (Second) of Torts* has long provided that a manufacturer is subject to liability, in negligent manufacturing cases, for harm caused by a chattel’s “lawful use in a manner and for a purpose for which it is supplied”;³⁰⁴ in negligent warnings cases, for harm from “use of the chattel in the manner for which . . . it is supplied”;³⁰⁵ and in negligent design cases, for harm from “probable use.”³⁰⁶ In warranty law,³⁰⁷ the Uniform Commercial Code built the misuse doctrine into the concept of a product’s “merchantability,” defined most broadly in terms of a product’s being fit for its “ordinary” purposes.³⁰⁸

In strict liability in tort, an original premise of manufacturer liability was that the injury arose out of the *proper* use of the product. As Judge Traynor observed, in *Greenman v. Yuba Power Products, Inc.*:³⁰⁹

Implicit in the machine’s presence on the market . . . was a representation that it would safely do *the jobs for which it was built* To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith *in a way it was intended to be used* as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith *unsafe for its intended use*.³¹⁰

In § 402A of the *Restatement (Second) of Torts*, the scope of strict products liability in tort is limited to injuries resulting from proper product uses: products safe for “normal handling” are not defective, and product sellers are shielded from strict liability for injuries resulting from “mishandling,” “overconsumption,” “excessive use,” and a failure to read and heed an adequate

303. See generally Noel, *supra* note 3, at 96. Still today, misuse concepts and nomenclature remain confused in many jurisdictions. See, e.g., *Hart-Albin Co. v. McLees Inc.*, 870 P.2d 51, 53-54 (Mont. 1994) (interpreting statutory “unreasonable misuse” phrase in terms of intended use, abnormal use, and unforeseeable use).

304. RESTATEMENT (SECOND) OF TORTS § 395 (1965).

305. *Id.* § 388.

306. *Id.* § 398 (special application of § 395).

307. See *infra* Part V.

308. See UCC § 2-314(2)(c). See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY *supra* note 8, § 4:7.

309. 377 P.2d 897 (Cal. 1963).

310. *Id.* at 901 (emphasis added).

warning.³¹¹ The *Third Restatement* succinctly limits responsibility in black-letter definitions of both design and warnings defects to “the foreseeable risks of harm posed by the product,”³¹² and the Reporters make it clear that courts bar recovery in design litigation for injuries that occur “[w]hen a product is put to an unforeseeable use.”³¹³

C. Misuse as a “Defense” and Burden of Pleading and Proof

One reason the doctrine of misuse is difficult to apply is that there is no agreement on just what kind of legal doctrine it really is. While many lawyers speak loosely of a product misuse “defense,” the common law principle of product misuse is more accurately viewed as a liability-limiting principle concerning the scope of a defendant’s duty that involves the issues of negligence, product defect, scope of warranty, and proximate causation.³¹⁴ As part of the plaintiff’s *prima facie* products liability case in most states,³¹⁵ the

311. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (stating that defectiveness not established by harm from “mishandling”); *id.* cmt. h (stating that product not defective when safe for “normal handling”; no liability for injuries from “abnormal handling” or “abnormal consumption”); *id.* cmt. i (stating that unreasonable danger not established by harm from “over-consumption”); *id.* cmt. j (stating that no duty to warn of generally known risks of excessive use; seller may assume warnings will be read and heeded, and product with adequate warning is neither defective nor unreasonably dangerous).

312. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2(b) & (c). Quite obviously, for a risk to be foreseeable, it must ordinarily result from a foreseeable product use. Comment *m* states:

m. Reasonably foreseeable uses and risks in design and warning claims. Subsections (b) and (c) impose liability only when the product is put to uses that it is reasonable to expect a seller or distributor to foresee. Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put.

Id. cmt. m; see also *id.* cmt. p.

313. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. p, reporters’ note, at 109 (1998).

314. See, e.g., *Marshall v. Clark Equip. Co.*, 680 N.E.2d 1102, 1108 (Ind. Ct. App. 1997) (discussing proximate and intervening causation, involving “foreseeability of an intervening misuse”); *Jurado v. Western Gear Works*, 619 A.2d 1312, 1319 (N.J. 1993) (discussing duty, product defect, and proximate cause); *Jeld-Wen, Inc. v. Gamble*, 501 S.E.2d 393, 396 (Va. 1998) (discussing duty). See also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmts. m, p. Regarding comment p, the reporters’ note states:

When a product is put to an unforeseeable use and the plaintiff claims that the product should have been designed to avoid injury when put to such a use, the courts agree that liability will not attach. There is widespread understanding that misuse in this context goes to the basic duty issue.

Id. § 2, cmt. p, reporters’ note, at 109 (1998). See generally DAN B. DOBBS, *THE LAW OF TORTS* § 370, at 1026 (2000); Prosser, *supra* note 297, at 824 (discussing product defect and proximate cause); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 846 (1973) (product defect, proximate cause, and scope of risk).

Courts and commentators have had real difficulty in ascertaining and explaining how different forms of misuse figure into the rubrics of duty, defectiveness, proximate cause, and affirmative defenses. The complexity of the issues, particularly in the context of comparative fault, is evident by the confusion in many of the decisions. See, e.g., *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 864-70 (Ariz. 1995) (necessitating three separate opinions); *Jurado*, 619 A.2d at 1318-19.

315. See, e.g., *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 356-57 (Md. 1985); *Newman v. Utility Trailer and Equip. Co.*, 564 P.2d 674, 676-77 (Or. 1977) (in banc). The court in *Newman* stated:

Before a manufacturer or other seller is strictly liable for injury

plaintiff must at least theoretically plead and prove that the accident arose out of a reasonably foreseeable product use which suggests that the plaintiff's unforeseeable misuse cannot be an affirmative defense. Yet, all but one of the several states that have enacted statutory reform provisions on misuse define it as an affirmative defense.³¹⁶

Courts and commentators have labored diligently in attempting to work out a clear and sound doctrine of misuse, often without success. The struggle with the meaning of the doctrine is illustrated in many judicial opinions. In one, for example, the Colorado Supreme Court concluded that "the defense of misuse . . . is a particularized defense requiring that the plaintiff's use of the product be unforeseeable and unintended as well as the cause of the injuries"³¹⁷ and further observed that "[m]isuse . . . is a question of causation. Regardless of the defective condition, if any, of a manufacturer's product, a manufacturer will not be liable if an unforeseeable misuse of the product caused the injuries."³¹⁸ The dissent characterized misuse as an "affirmative defense."³¹⁹ By contrast, in another case, the New Jersey Supreme Court concluded that "[t]he absence of misuse is part of the plaintiff's case," that "[m]isuse is not an affirmative defense," and that "the plaintiff has the burden of showing that there was no misuse or that the misuse was objectively foreseeable."³²⁰ Other courts have similarly disagreed as to the true role of plaintiff misuse in products liability litigation, and the perplexities are magnified in jurisdictions that attempt to blend misuse into a system of comparative fault.³²¹

When all is said and done, there probably is no logical way to avoid treating the absence of misuse as a matter of scope of the defendant's responsibility and, hence, as part of the plaintiff's case.³²² Nor does there seem to be any sound reason for a court to try to work around the logic in order to convert the doctrine into an affirmative defense. While one might think at first that plaintiffs would be advantaged if misuse were treated as an affirmative defense (giving the defendant the burden of pleading and proof) rather than as part of the plaintiff's case, the issue ordinarily is of little or no practical consequence in products liability litigation. Defendants typically treat product

inflicted by a product, the product must have been put to a foreseeable use. As an example: if a shovel is used to prop open a heavy door, but, because of the way the shovel was designed, it is inadequate to the task and the door swings shut and crushes the user's hand, no responsibility for the injury results by reason of the shovel's not being designed to prop open doors since it was not reasonably foreseeable by the manufacturer or seller that it would be so used.

Id. at 676-77; cf. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. m (1998). But cf. *id.*, cmt. p, at 38. See generally Noel, *supra* note 3.

316. See *supra* Part I; cf. Peter Zablotsky, *The Appropriate Role of Plaintiff Misuse in Products Liability Causes of Action*, 10 *TOURO L. REV.* 183, 201-04 (1993) (collecting the cases and stating that most courts properly hold misuse to be an affirmative defense).

317. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1325 (Colo. 1986).

318. *Id.*

319. *Id.* at 1332.

320. *Jurado v. Western Gear Works*, 619 A.2d 1312, 1317 (N.J. 1993).

321. For one court's valiant efforts to unravel the mysteries of how the doctrine of product misuse fits into the comparative fault system, compare the different judges' opinions in *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 862, 870-71 (Ariz. 1995).

322. See *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 546 (Iowa 1980) (abandoning view that misuse is an affirmative defense for view that it is part of plaintiff's burden to prove product defect and causation); see also *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185 (Iowa 1982).

misuse like any other misconduct defense, offering evidence and argument upon the issue whether or not the plaintiff has pleaded the absence of misuse in the complaint. In a jurisdiction that requires a plaintiff to plead the absence of misuse, it is difficult to imagine a court refusing to allow a plaintiff to amend the complaint to include this aspect of the claim. More importantly, because plaintiffs rarely fail to plead proximate causation—that the defendant's negligence, breach of warranty, or a product defect proximately caused the plaintiff's harm—virtually every complaint includes at least an implicit allegation of the absence of misuse. This is because the absence of misuse is built into the concepts of negligence, breach of warranty, product defectiveness, and, especially, proximate causation. Finally, the burden of proof only infrequently provides a significant tactical advantage, and it would seem that defendants typically would prefer to have a clear-cut misuse "defense," especially one created by the legislature, to argue to the court or jury.

D. The Foreseeability Limitation

"The ways in which a product might be misused are, like the stars, an endless number."³²³ In order to protect product sellers from liability for accidents caused by adventurous product uses, courts in recent years have almost universally limited responsibility to "foreseeable" product uses.³²⁴ Yet, defining a principle that supposedly is one of limitation in such an amorphous manner creates enormous problems of application, which is a major reason why the misuse defense is so much easier to state than to apply. Indeed, the innate vagueness of "foreseeability" as the one definitional standard for the doctrine—its only limiting basis—renders the definition of misuse virtually meaningless as a device for determining the scope of liability in actual cases. That is, since the doctrine of product misuse is defined in terms of foreseeability, which is an illusory and confusing notion,³²⁵ the doctrine effectively has no real definition. At the end of the day, however, as in

323. *Goodman v. Stalfort, Inc.*, 411 F. Supp. 889, 894-95 (D.N.J. 1976) (Biunno, J.) (discussing misuse where plaintiff was burned by flashback when he poured charcoal fluid on grill after enlarging the can's opening with tine of garden tool to increase its flow).

324. The foreseeability limitation has long been recognized. *See generally* Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 54-55 (1956) (citing cases from 1852). Recent statements and applications of the principle include *Hicks v. Commercial Union Ins. Co.*, 652 So. 2d 211 (Ala. 1994); *Romito v. Red Plastic Co.*, 44 Cal. Rptr. 2d 834 (Ct. App. 1995); *Lutz v. Nat'l Crane Corp.*, 884 P.2d 455 (Mont. 1994); *Jurado*, 619 A.2d 1312; and *Slone v. Gen. Motors Corp.*, 457 S.E.2d 51 (Va. 1995).

325. *See, e.g., Venezia v. Miller Brewing Co.*, 626 F.2d 188, 191 (1st Cir. 1980) (applying Massachusetts law); *Moran v. Faberge, Inc.*, 332 A.2d 11, 26 (Md. 1975) (O'Donnell, J., dissenting). Judge O'Donnell observed:

It seems to me that the majority has fallen into the pitfall, recognized by Professor Prosser, who, in undertaking to analyze the treatment by the various courts of the illusory concept of "foreseeability" and noting the confusion resulting therefrom, states:

"Some 'margin of leeway' has to be left for the unusual and the unexpected. But this has opened a very wide door; and the courts have taken so much advantage of the leeway that it can scarcely be doubted that a great deal of what the ordinary man would regard as freakish, bizarre, and unpredictable has crept within the bounds of liability by the simple device of permitting the jury to foresee at least its very broad, and vague, general outlines."

Id. at 26 (quoting W. Prosser, *Torts*, § 43, at 269 (4th ed. 1971)).

"defining" proximate causation in terms of foreseeable risk,³²⁶ there is at least a little comfort in the flexibility provided to the factfinder by framing the scope of responsibility for product use in terms of foreseeability.³²⁷

The best that the courts have been able to do in placing at least the appearance of some halter on this concept is to modify it with the word "reasonable," limiting a manufacturer's responsibility for accidents resulting from uses that are "reasonably foreseeable."³²⁸ Surely such a definition of the standard may be faulted for providing no further touchstone for deciding cases, but a reasonableness modification of foreseeability is plainly better than leaving it stark naked. So modifying foreseeability usefully reminds courts and juries that there are indeed reasonable limits to the kind of uses a manufacturer fairly must consider when making design and warnings decisions.

The intrinsic vagueness of the foreseeability concept in the misuse context, which diminishes its usefulness for either ascribing or predicting liability, has been lamented by the courts.³²⁹ While some uses, especially common ones,³³⁰ are clearly foreseeable, and others, particularly those that are especially bizarre, are clearly unforeseeable, the great majority of uses fall in the "vast middle ground of product uses about which reasonable minds could disagree as to whether they are or should be foreseeable to the manufacturer."³³¹ The decisions go all over the board on the foreseeability of misuse issue, and the best that can be said is that a prudent judge will almost always recognize product misuse as a question of fact for a jury to decide.³³²

Accordingly, whether advising a seller trying to comply with the law at the time of designing and marketing its products or a plaintiff contemplating a lawsuit, a lawyer can only guess how the foreseeability issue will be resolved at trial. A prudent lawyer would hesitate to predict whether a judge or jury

326. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, ch. 13.

327. See generally Twerski, *The Many Faces of Misuse*, *supra* note 283, at 426.

328. See *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 191-92 (Iowa 1982); *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 354 (Md. 1985); *Newman v. Utility Trailer & Equip. Co.*, 564 P.2d 674, 676-77 (Or. 1977) (en banc); *Jeld-Wen, Inc. v. Gamble*, 501 S.E.2d 393, 397 (Va. 1998) (finding that use not "reasonably foreseeable" as a matter of law); cf. *Jurado v. Western Gear Works*, 619 A.2d 1312, 1319 (N.J. 1993) (articulating "objectively" foreseeable standard).

329. See, e.g., *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980) (applying Massachusetts law):

Plaintiff . . . attempts to expand the scope of the "intended" use concept by resort to the familiar, and sometimes misleading, rubric of "foreseeability." But reliance on such generality is of limited assistance, for "In a sense, in retrospect almost nothing is unforeseeable." One with the time and imagination and aided by hindsight no doubt can conjure up all sorts of arguably "foreseeable" misuses of a variety of otherwise reasonable safe products.

Id. at 191 (citations omitted). See also *Moran v. Faberge, Inc.*, 332 A.2d 11, 26 (Md. 1975) (O'Donnell, J., dissenting).

330. If persons regularly use a product in a dangerous, unintended manner, the use was probably a foreseeable one. See, e.g., *Gootee v. Colt Indus., Inc.*, 712 F.2d 1057, 1065 (6th Cir. 1983) (noting that use of revolver half-cock as a safety is a virtually universal practice); *Lamer v. McKee Industries, Inc.*, 721 P.2d 611, 615 (Alaska 1986) ("[A] manufacturer should not be relieved of responsibility simply because it closes its eyes to the way its products are actually used by consumers.").

331. *Moran*, 332 A.2d at 16.

332. See, e.g., *id.* at 21; *Allen v. Minnstar, Inc.*, 97 F.3d 1365, 1368-69 (10th Cir. 1996) (applying Utah law); *Haag v. Bongers*, 589 N.W.2d 318, 329 (Neb. 1999); *Price v. BIC Corp.*, 702 A.2d 330, 333 (N.H. 1997); *Materials Trans. Co. v. Newman*, 656 So. 2d 1199, 1202 (Miss. 1995).

would find that a manufacturer reasonably should foresee that a young boy will hurl a beer bottle against a telephone pole;³³³ a teenage girl will scent a candle by pouring cologne upon it below the flame;³³⁴ a woman wearing a cotton flannelette nightgown inside out, with its pockets protruding, will lean over the burner of a stove causing a pocket to come in contact with a flame;³³⁵ a person will insist on buying shoes that are too small for her feet;³³⁶ on buying automobile tires too large for his rims,³³⁷ on sitting in a chair³³⁸ or an exercise bicycle³³⁹ too frail for one's weight (300 and 500 pounds, respectively), or on standing on an ordinary chair;³⁴⁰ a car will be driven at 115 mph, go out of control, and injure a third party;³⁴¹ a tire, designed for speeds to 85 mph, equipped on a car designed for speeds over 100 mph, will blow out at 100 mph;³⁴² a car's emergency brake will be left on undetected at highway speeds long enough to vaporize the hydraulic brake fluid, causing the brakes to fail;³⁴³ a person will attempt suicide by closing herself in a car trunk without an inside release latch, change her mind, and be trapped inside for nine days thereafter;³⁴⁴ an empty Clorox container will be used to store gasoline, will tip over, and the gasoline will be ignited by a spark from the motor of an electric appliance in another room;³⁴⁵ a patient will walk, against doctor's orders, on his broken leg held together with a defective surgical pin designed only to stabilize the fracture, not to support the weight of a man;³⁴⁶ a machine will not be properly maintained;³⁴⁷ a person will pour hot Wesson Oil from the skillet back into the bottle and then recap the bottle, causing it to explode;³⁴⁸ "burning alcohol," sold only for professional dental use, will be drunk by penal farm inmate dental assistants who then go blind;³⁴⁹ a screen on a second story window will not

333. *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 189 (1st Cir. 1980) (*unforeseeable* as a matter of law).

334. *Moran v. Faberge, Inc.*, 332 A.2d 11, 21 (Md. 1975) (jury could find *foreseeable*).

335. *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 357 (Md. 1985) (*foreseeable* as a matter of law).

336. RESTATEMENT (SECOND) OF TORTS § 395, cmt. j (*unforeseeable*); *Dubbs v. ZakBros. Co.*, 175 N.E. 626, 627 (Ohio Ct. App. 1931) (*unforeseeable*).

337. *McDevitt v. Standard Oil Co. of Tex.*, 391 F.2d 364 (5th Cir. 1968) (*unforeseeable*—by implication).

338. *Horne v. Liberty Furniture Co.*, 452 So. 2d 204 (La. Ct. App. 1984) (*foreseeable*—by implication).

339. *Dunne v. Wal-Mart Stores, Inc.*, 679 So. 2d 1034, 1037 (La. Ct. App. 1996) (*foreseeable*).

340. See RESTATEMENT (SECOND) OF TORTS § 395, cmt. k, at 331 (1965) (*foreseeable*).

341. *Schemel v. General Motors Corp.*, 384 F.2d 802, 805 (7th Cir. 1967) (no duty to foresee such grossly careless misuse), *overruled on other grounds by Huff v. White Motor Corp.*, 565 F.2d 104, 106 n.1, 109-10 (7th Cir. 1977).

342. See *LeBouef v. Goodyear Tire & Rubber Co.*, 451 F. Supp. 253, 257-58 (W.D. La. 1978) (*foreseeable*).

343. *Knapp v. Hertz Corp.*, 375 N.E.2d 1349, 1355 (Ill. App. Ct. 1978) (*foreseeable*).

344. *Daniell v. Ford Motor Co., Inc.*, 581 F. Supp. 728, 731 (D.N.M. 1984) (*unforeseeable* as a matter of law).

345. *Taylor v. Gen. Elec. Co.*, 505 A.2d 190, 194 (N.J. Super. Ct. App. Div. 1986) (*foreseeable* as a matter of law).

346. *Stewart v. Von Solbrig Hosp., Inc.*, 321 N.E.2d 428, 432 (Ill. App. Ct. 1974) (misuse as a matter of law).

347. *Wilson v. Crouse-Hinds Co.*, 556 F.2d 870 (8th Cir. 1977) (jury could find *foreseeable*).

348. *Chandler v. Hunt Food & Indus., Inc.*, Prod. Liab. Rep. (CCH) ¶ 5969 (Tenn. 1968) (*unforeseeable*—by implication).

349. *Barnes v. Litton Indus. Prod., Inc.*, 555 F.2d 1184, 1187-88 (4th Cir. 1977) (a jury could properly find *foreseeable*).

withstand the pressure of a baby boy waving good-bye to his mother;³⁵⁰ a doctor will transplant synthetic fibers, normally used for wigs and hairpieces, into a patient's scalp as a treatment for baldness, causing irritation and infection;³⁵¹ a grocery shopper who trips will hope that a shopping cart does not scoot away when he grabs for it to save himself from falling;³⁵² the owner of a riding lawn mower will attach a wooden "dog box" to the mower and place a two-year-old child in the box who will fall out and be run over by the mower;³⁵³ a youth will tilt or rock a soft-drink vending machine, to dispense a can without payment, causing the machine to fall upon and kill him;³⁵⁴ a teenage boy will hang himself with a rope on a swing set as a joke to impress the girls;³⁵⁵ a youth, thinking the safety is on, will point a BB gun at his friend's head and pull the trigger;³⁵⁶ a small child will eat a "spit devil" firework wrapped in plain red paper that looks like candy;³⁵⁷ a baby will drink a bright red furniture polish that looks like a soft drink;³⁵⁸ a child will open and stand on an oven door to see what is cooking on the stove, causing the stove and a pot of boiling water to topple over;³⁵⁹ a boy, while riding a canister vacuum cleaner like a toy car will be injured when his penis slips through an opening into the cleaner's fan;³⁶⁰ or that children will play with a gas can without a child-proof top.³⁶¹

350. *Jeld-Wen, Inc. v. Gamble*, 501 S.E.2d 393, 397 (Va. 1998) (*unforeseeable* as a matter of law).

351. *Berg v. Underwood's Hair Adaption Process, Inc.*, 751 F.2d 136, 137 (2d Cir. 1984) (*unforeseeable*—no duty as a matter of law).

352. *Smith v. Technibilt, Inc.*, 791 S.W.2d 247, 250 (Tex. App. 1990) (*unforeseeable* as a matter of law).

353. *Erkson v. Sears, Roebuck & Co.*, 841 S.W.2d 207, 211 (Mo. Ct. App. 1992) (*unforeseeable* as a matter of law).

354. *Compare Oden v. Pepsi Cola Bottling Co.*, 621 So. 2d 953, 955 (Ala. 1993) (*unforeseeable* because person may not impose liability on another for consequences of person's own act of moral turpitude), *with Morgan v. Cavalier Acquisition Corp.*, 432 S.E.2d 915, 921 (N.C. Ct. App. 1993) (jury could find *foreseeable*) and *Ridenour v. Bat Em Out*, 707 A.2d 1093, 1096 (N.J. Super. Ct. App. Div. 1998) (jury could find *foreseeable* in "change machine" case).

355. *Smith v. Holmes*, 606 N.E.2d 627, 637 (Ill. App. Ct. 1992) (*unforeseeable* as a matter of law).

356. *Sherk v. Daisy-Heddon*, 450 A.2d 615, 618 (Pa. 1982) (*foreseeable*, but danger was obvious and warned against).

357. *Victory Sparkler & Specialty Co. v. Latimer*, 53 F.2d 3, 4 (8th Cir. 1931) (jury could properly find *foreseeable*).

358. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83-84 (4th Cir. 1962) (jury could properly find *foreseeable*).

359. *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 260 (R.I. 1971) (jury could properly find *foreseeable*).

360. *Larue v. National Union Elec. Corp.*, 571 F.2d 51 (1st Cir. 1978) (*unforeseeable* as a matter of law).

361. *Compare Simpson v. Standard Container Co.*, 527 A.2d 1337, 1341 (Md. Ct. Spec. App. 1987) (*unforeseeable* as a matter of law, where label on the can warned against storing in a living area), *with Keller v. Welles Dep't. Store of Racine*, 276 N.W.2d 319, 324 (Wis. Ct. App. 1979) (*foreseeable*). In *Keller*, the court remarked:

Children are incurably curious about their environment. . . . A gasoline can . . . is commonly stored either on the floor or on a low shelf. These are areas readily accessible to children in their "explorations." It is not unforeseeable that a child might attempt to taste the liquid in the can [or,] in the course of playing "mow the lawn" or "gas station," a child might pour the gasoline from the can.

Id. at 324.

If there is a common thread in the decisions on the meaning of the “foreseeability” limitation to product uses, it is one of limiting a seller’s responsibility to uses that are *fair*. While the *fairness* of a product’s use provides little more direct guidance than the notion of foreseeability, it at least provides a depth and richness for embracing all the equities of a particular case—quite similar to the *reasonableness* of foreseeability of use. An important aspect in evaluating the fairness or foreseeability of particular uses is whether a reasonable consumer might fairly *expect* the product to be able to withstand that use.³⁶² As one court explained, misuse may be viewed as a “use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for.”³⁶³ Applying this principle to deny recovery to a boy whose eye was injured when he threw a discarded beer bottle against a telephone pole, shattering the glass bottle, another court concluded that a reasonable consumer could expect nothing else.³⁶⁴

While the consumer expectations test has withered considerably as a principal test of product defectiveness,³⁶⁵ a consumer expectations standard in some cases provides a sound foundation for defining the limits of use for which a manufacturer fairly may be held accountable. Yet, the usefulness of a consumer expectation standard in the misuse context, as more generally in ascertaining a product’s defectiveness, depends upon the type of product and risk at issue. Consumers have quite well-defined and reasonable expectations about the performance limits of some products, especially more simple ones, but they often have no idea of the limitations of complex products operating in complex environments, such as the extent to which an automobile is or should be able to withstand a particular type of serious crash.³⁶⁶ Thus, in a case where the hazards from a particular type of misuse are clear, a court might fairly conclude that the use was not reasonably foreseeable if it was one that a reasonable consumer would not expect the product safely to withstand.

Whether one views the misuse issue in terms of the foreseeability of the plaintiff’s use, the presence or absence of a defect, or the presence or absence of proximate cause, the result in each case depends ultimately upon the reasonable foreseeability, or fairness, of the plaintiff’s particular use. If the manufacturer or other product seller reasonably should have contemplated and guarded against the risk, the defendant is subject to liability for the harm; if the plaintiff put the product to an unforeseeable, unfair use, the defendant simply is not liable.

362. See *supra* note 293 and accompanying text.

363. Findlay v. Copeland Lumber Co., 509 P.2d 28, 31 (Or. 1973).

364. Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980) (applying Massachusetts law). The court found that “[n]o reasonable consumer would expect anything but that a glass beer bottle . . . would fail to safely withstand the type of purposeful abuse involved here.” *Id.* at 190-91.

365. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 5:6, at 299.

366. See, e.g., Soule v. Gen. Motors Corp., 882 P.2d 298, 308-10 (Cal. 1994). See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 8:6, at 475.

E. Failure to Follow Warnings and Instructions

A user's failure to follow a manufacturer's warnings of danger or instructions on safe use provides a special form of misuse which ordinarily should bar recovery whenever the danger from noncompliance is evident, the noncompliance is a substantial cause of the plaintiff's harm, and there is no simple way or apparent reason for the manufacturer to design the danger out of the product. Despite common knowledge (and hence foreseeability) that users often ignore warnings and instructions, many courts, and a few legislatures,³⁶⁷ have long had little sympathy with plaintiffs who are injured because they ignore warnings and instructions.³⁶⁸ Comment *j* to the *Restatement (Second) of Torts* § 402A states the rule quite clearly: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."³⁶⁹ Accordingly, if there was no practical way or reason for the manufacturer to design the danger away, courts have widely ruled that a user's failure to read or heed adequate instructions for safe use, sometimes characterized as "misuse," bars recovery.³⁷⁰ It generally is both logical and fair to preclude recovery to a user who knowingly ignores the admonitions of a manufacturer's full and fair warnings and instructions, for the user by so doing knowingly pushes the product unfairly beyond its stated safety

367. Statutes in at least Arizona, New Jersey, and North Carolina provide blanket protection to a defendant for injuries resulting from the plaintiff's violation of a warning or instruction. See ARIZ. REV. STAT. ANN. § 12-683(3) (West 1992); N.J. STAT. ANN. § 2A:58C-4 (West 1987); N.C. GEN. STAT. 99B-4(1) (1999). New Jersey's provision limits this defense to cases involving "adequate" warnings and instructions; Arizona's statute and North Carolina's statute do not, although North Carolina's statute is limited to warnings and instructions of which the user reasonably should have been aware. A Michigan statute's definition of misuse includes uses contrary to warnings and instructions, MICH. COMP. LAWS ANN. § 600.2945(e) (West 2000), but it provides an immunity only for unforeseeable misuse. *Id.* § 600.2947(2) (West 2000).

368. An early example is *Fredendall v. Abraham & Straus, Inc.*, 18 N.E.2d 11 (N.Y. 1938).

369. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j, at 353.

370. See PROSSER, *supra* note 51, § 102, at 669 ("The seller is entitled to have his warnings and instructions followed; and when they are disregarded, and injury results, he is not liable."); see, e.g., *Kampen v. American Isuzu Motors, Inc.*, 157 F.3d 306, 309 (5th Cir. 1998) (en banc) (applying Louisiana law and barring plaintiff's claim when he failed to read instructions in manual and spare tire compartment not to "get beneath the car" and was crushed because jack supporting car collapsed); *Watson v. Uniden Corp. of Am.*, 775 F.2d 1514, 1515 (11th Cir. 1985) (finding that failure to follow instructions is not use in "normal" manner for purposes of implied warranty claim but jury issue on negligence and strict liability warnings adequacy claims); *Bell v. Montgomery Ward*, 792 F. Supp. 500, 505-06 (W.D. La. 1992) (finding against person mowing lawn, who lost two toes in mower when he slipped on wet grass and had ignored warnings to keep guards in place and feet away from blade and not to wear tennis shoes or to mow on wet grass or on slopes steeper than 15 degrees); *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1326 (Colo. 1986) (discussing housekeeper who used bare hands to wring out mop used to apply bathroom cleaning solution containing 23% hydrochloric acid; label warned against skin contact to avoid chemical burns and to wash skin area well if contact occurred); *Peterson v. Parke Davis & Co.*, 705 P.2d 1001, 1003-04 (Colo. Ct. App. 1985) (discussing implications of doctor's failure to read or heed warnings and instructions in package insert, leaving patient on toxic drug despite contra-indications); *Hughes v. Massey-Ferguson, Inc.*, 490 N.W.2d 75, 78 (Iowa Ct. App. 1992) (barring recovery of farmer who walked on 3 inch rim over auger without first shutting off corn head as warnings instructed); *Sturm, Ruger & Co. v. Bloyd*, 586 S.W.2d 19, 22 (Ky. 1979) (barring recovery of six-shooter revolver owner, who left hammer resting on firing pin in line with loaded cartridge, contrary to explicit instructions and warnings; gun discharged when dropped on floor).

capabilities. But if the disregarded warning or instruction is itself inadequate, so that the user is not fairly informed about the danger, then the failure to follow warnings or instructions is foreseeable and, generally, excusable as well. In such a case, "if the injury resulting from foreseeable misuse of a product is one which an adequate warning concerning the use of the product would likely prevent, such misuse is no defense."³⁷¹ Moreover, because of the foreseeability that warnings may be disregarded, modern courts generally hold that manufacturers have an independent duty to design away dangers if there is a reasonable way to do so.³⁷²

F. Comparative Fault

Whether and to what extent "product misuse" should be merged into a jurisdiction's system of comparative fault, and so treated as a damage-reducing factor rather than as a total bar, is a vexing problem which has yet to be deliberately addressed by most courts and legislatures. Viewing misuse merely as another plaintiff misconduct "defense," some courts and legislatures have simply merged it into their comparative fault schemes. In those states, misuse will reduce but not bar a plaintiff's recovery, unless, in modified comparative fault states, the plaintiff's fault is found to exceed that of the defendant.³⁷³ Such a merger requires confronting the issue of what types of misuse will be treated on a comparative fault basis, and whether unforeseeable misuse will still serve as a total bar. At least a couple of courts have ruled mysteriously that a plaintiff's unforeseeable misuse is somehow subject to comparison with the defendant's conduct or a product defect, "that where an unreasonably dangerous defect of a product and the plaintiff's assumption of risk or *unforeseeable misuse* of the product are

371. *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416, 422-23 (Tex. App. 1976), *rev'd on other grounds* 561 S.W.2d 801 (Tex. 1978); *see also Harless v. Boyle-Midway Div., Am. Home Prod.*, 594 F.2d 1051, 1055 (5th Cir. 1979) ("It seems both confusing and internally inconsistent to ask a jury who has previously concluded that the label was *inadequate* to consider the defense of failure to read an *adequate* label."); *Huynh v. Ingersoll-Rand*, 20 Cal. Rptr. 2d 296, 300-01 (Ct. App. 1993); *Johnson v. Johnson Chem. Co.*, 588 N.Y.S.2d 607, 610 (App. Div. 1992) (discussing situation where plaintiff failed to read roach bomb instruction to extinguish pilot lights or open flames).

372. *See, e.g., Lewis v. Am. Cyanamid Co.*, 682 A.2d 724, 732 (N.J. Super. Ct. App. Div. 1996):

If there is an objectively foreseeable likelihood that a product will be subject to misuse and that that misuse will endanger users despite appropriate warnings, then warnings alone will not satisfy the manufacturer's duty. In addition to providing warnings, the manufacturer must also take all other feasible measures required by a risk-utility analysis to make even anticipated misusers of the product reasonably safe.

Id. at 732; *accord*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. I.

373. *See, e.g., Elliot v. Sears, Roebuck & Co.*, 642 A.2d 709 (Conn. 1994) (asserting that misuse in a strict liability setting as incorporated into considerations of comparative fault); *Standard Havens Prod., Inc. v. Benitez*, 648 So. 2d 1192, 1197 (Fla. 1994) (finding misuse not a bar in negligence action, following similar holding on strict liability). At least two states have enacted legislation accomplishing this result. *See* IDAHO CODE § 6-1405(3) (Michie 1998) (requiring reduction of claimant's damages according to comparative responsibility for misuse; "misuse" defined as "when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances"); MO. STAT. ANN. § 537.765.3 (West 2000) (declaring that for comparative fault apportionment, plaintiff's "fault" includes product uses (1) not reasonably anticipated by the manufacturer, and (2) for purposes not intended by the manufacturer).

concurring proximate causes of the injury suffered, the trier of fact must compare those concurring causes to determine the respective percentages" for the apportionment of damages.³⁷⁴

However, it seems more logical to view *unforeseeable* misuse as lying entirely outside the scope of responsibility of manufacturers and other sellers and, hence, outside the ambit of comparative fault. Because a seller has no duty to guard against unforeseeable product risks, there ordinarily is no seller fault or product defect in such cases to compare.³⁷⁵

To achieve a fair and sensible result in most cases, and to avoid an utterly confusing mixture of doctrines, the best approach (if not prohibited by statute) is to consider a user's *foreseeable* misuse as any other kind of comparative fault for allocation to the plaintiff. On the other hand, if a substantial cause of the plaintiff's injury was his or her *unforeseeable* misuse of a product, then the plaintiff's conduct generally should be considered the sole proximate cause of the harm and so bar any recovery whatsoever.³⁷⁶ Such a bright line rule for unforeseeable misuse in comparative fault jurisdictions might seem crude, and juries allowed to allocate responsibility between a product defect and a plaintiff's unforeseeable misuse might conceivably be able to do better justice in some small set of cases. But the number of cases in which the plaintiff's injury is substantially traceable to both a product defect and the plaintiff's unforeseeable misuse (which is not the sole proximate cause of an accident) is surely very small. Like counting angels on a pinhead, the very concept of such combined causation is difficult to grasp and even more difficult to put to use.³⁷⁷ In a real world where the law can only hope to do substantial justice most of the time, rather than perfect justice all of the time, a simple rule that bars liability altogether if a plaintiff's unforeseeable product misuse was a substantial cause of the harm appears to be the fairest way, both within and outside of comparative fault, to resolve most cases in a common sense and practical way.³⁷⁸

374. *Mauch v. Mfrs. Sales & Serv., Inc.*, 345 N.W.2d 338, 348 (N.D. 1984) (emphasis added) (citing *Gen. Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977) (making heroic attempt to explicate and justify this nonsense), *overruled on other grounds by* *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), and *by* *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984)).

375. *See, e.g., States v. R.D. Werner Co.*, 799 P.2d 427, 430 (Colo. Ct. App. 1990) (finding that unlike comparative negligence, which diminishes recovery, unforeseeable misuse of ladder from which plaintiff fell goes to causation and completely bars recovery, regardless of defective condition).

376. This is the approach taken by most courts, and it is adopted by the Uniform Comparative Fault Act. *See supra* note 287.

377. The confusion from combining doctrines (comparative fault and misuse) and sources of law (courts and legislatures) is illustrated by *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861 (Ariz. 1995), although Judge Martone's concurring opinion makes good sense: "[T]rue misuse (unforeseeable, sole cause) continues to be an all or nothing defense Foreseeable misuse (concurring cause) is really contributory negligence, and is now a comparative defense to a products case." *Id.* at 873.

378. When a product is defective and the user puts it to an unforeseeable use, "then the accident was not proximately caused by the product defect." PROSSER & KEETON ON TORTS, *supra* note 50, § 102, at 711.

V. DEFENSES TO WARRANTY CLAIMS

A. *In General*

How a plaintiff's misconduct affects liability in warranty is one of the most confused issues in all of products liability law.³⁷⁹ To a large extent, the confusion springs from the long, uneasy relationship between warranty law and tort. The law of warranty, one must not forget, is "a freak hybrid born of the illicit intercourse of tort and contract."³⁸⁰ But that origin lies in the distant past, and most courts now view warranty law as a part of the law of contracts.³⁸¹ In the contractual warranty context, where breach of warranty is predicated upon the falsity of a seller's representation or the failure of its goods to meet a commercial norm, rather than upon the seller's fault, a defense based upon a user's contributory negligence or dangerously venturous misbehavior seems oddly out of place. Yet, particularly in cases involving personal injuries resulting from a user's unforeseeably hazardous or knowingly dangerous and unreasonable product use, the courts have shown a manifest reluctance to accept the proposition that such misconduct is out of bounds simply because a warranty claim sounds in contract.

A variety of conflicting overlaps in legal categories add to the confusion. While the doctrine of strict products liability in tort (which itself developed from warranty law)³⁸² is largely a creature of the common law, the law of warranty is now principally enshrined, via Article 2 of the Uniform Commercial Code, in statute.³⁸³ In addition, there are conflicts between differing definitions of the tort-based misconduct defenses of the common law, on the one hand, and the misconduct defenses enacted in recent products liability reform statutes, on the other. Further, user misconduct is handled in a variety of ways under various systems of comparative fault, most created by legislation but some by common law. In the warranty setting, many courts compound the confusion by altering in the warranty setting traditional tort law

379. See generally BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* ¶ 12.03[8][b], at 12-17 (1984); ROBERT J. NORDSTROM, *LAW OF SALES* §§ 81-84 (1970); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 11-8 (5th ed. 2000) [hereinafter WHITE & SUMMERS]; Joel R. Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968); Sonja A. Soehnel, Annotation, *Products Liability: Contributory Negligence or Assumption of Risk as Defense in Action for Strict Liability or Breach of Warranty Based on Failure to Provide Safety Device for Product Causing Injury*, 75 A.L.R.4th 538 §§ 16-20 (1990) (discussing warranty misconduct defenses to claims of failure to provide safety devices); E.L. Kellett, Annotation, *Contributory Negligence or Assumption of Risk as Defense to Action for Personal Injury, Death, or Property Damage Resulting From Alleged Breach of Implied Warranty*, 4 A.L.R.3d 501 (1965) (discussing warranty misconduct defenses in general).

380. Prosser, *supra* note 297, at 800; see also Note, *Defense of Change of Position in Cases of Payment Under Mistake on a Negotiable Instrument*, 42 HARV. L. REV. 411, 414-15 (1929). See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 5:2.

381. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965) (applying Pennsylvania law); *Jarnot v. Ford Motor Co.*, 156 A.2d 568, 572 (Pa. Super. Ct. 1959).

382. This development occurred in America during the 1950s and early 1960s. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, §§ 5:2 to :3.

383. See *id.* ch. 4, at 120.

definitions and effects of various forms of plaintiff misbehavior.³⁸⁴ In an attempt to avoid this quagmire, some courts have simply abandoned all use of the traditional tort law terms used to describe plaintiff misconduct.³⁸⁵

The issue examined here is what the effect should be on a claim for breach of express or implied warranty against a product seller if a plaintiff carelessly uses a product, ignores warnings and instructions, deliberately and unreasonably engages a product danger, or puts a product to an unforeseeably dangerous use. Stated otherwise, do the tort law misconduct defenses of contributory negligence, assumption of risk, and product misuse apply to warranty claims; are there any misconduct defenses unique to warranty claims; and what is the effect of comparative fault doctrine on warranty misconduct defenses? While the developing warranty law on these questions in some states roughly parallels the law applied in strict products liability in tort,³⁸⁶ and while eventual convergence is not unfathomable,³⁸⁷ the law on warranty misconduct defenses is teetering at the edge of chaos. The best that can be done here is to describe the principal approaches the courts have taken and to indicate which appear most fair and logical.

B. Contributory Negligence and Assumption of Risk

In 1966, Dean Prosser wrote that “[s]uperficially the warranty cases . . . are in a state of complete contradiction and confusion as to the defense of contributory negligence.”³⁸⁸ Some early cases held that contributory negligence should simply bar recovery in warranty, reasoning, for example, that “[w]arranty is not insurance, and there is nothing in this contract to indicate that either party supposed the defendant was to answer for the plaintiff’s carelessness.”³⁸⁹ Occasional decisions still hold that a plaintiff’s

384. “Some courts maintain that contributory negligence is no defense but hold that the defendant may parade the same misconduct of the plaintiff before the jury to show a lack of proximate cause.” *WHITE & SUMMERS*, *supra* note 379, § 11-8, at 408, (citing *Ford Motor Co. v. Lee*, 224 S.E.2d 168, 170 (Ga. Ct. App. 1976) (“In an action predicated on a breach of warranty, there is no defense per se of contributory negligence, but such defense presents a jury question as to whether the injuries resulted from the breach.”), *aff’d in part, rev’d in part*, 229 S.E.2d 379 (Ga. 1976)); *see also* *Imperial Die Casting Co. v. Covil Insulation Co.*, 216 S.E.2d 532, 534 (S.C. 1975).

385. *See Huebert v. Fed. Pac. Elec. Co.*, 494 P.2d 1210, 1216 (Kan. 1972) (noting that several courts have abandoned use of “contributory negligence” and “assumption of risk” terms to avoid semantic problems in implied warranty cases, and holding that such concepts “in their normal meaning are not defenses” to actions for breach of express warranty).

386. *See, e.g., Duff v. Bonner Bldg. Supply, Inc.*, 666 P.2d 650, 653 (Idaho 1983) (finding that assumption of risk and misuse are defenses to breach of warranty actions, but contributory negligence is not); *Gregory v. White Truck & Equip. Co.*, 323 N.E.2d 280 (Ind. Ct. App. 1975).

387. *See WOODS & DEERE*, *supra* note 5, § 14:17, at 339.

388. Prosser, *supra* note 297, at 838. On whether contributory negligence is a defense to an implied warranty action, “the authorities are hopelessly divided.” *Gardner v. Coca Cola Bottling Co.*, 127 N.W.2d 557, 562 (Minn. 1964); *see also* *Levine*, *supra* note 379, 647-52.

389. *Razey v. J.B. Colt Co.*, 94 N.Y.S. 59, 61 (App. Div. 1905) (finding that plaintiff’s contributory negligence barred recovery when plaintiff used gas generator in room with lighted gas jet); *see also* *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343, 346 (10th Cir. 1962) (applying Colorado law and barring plaintiff’s claim when the sole proximate cause of harm to plaintiff, who was burned when match ignited her nightgown, was her contributory negligence in smoking and using matches in bed while in semiconscious state induced by potent sleeping pill); *Posey v. Pensacola Tractor & Equip. Co.*, 138 So. 2d 777, 780 (Fla. Dist. Ct. App. 1962); *Finks v. Viking Refrigerators, Inc.*, 147 S.W.2d 124, 130 (Mo. Ct. App. 1940); *Eisenbach v.*

contributory negligence should bar recovery.³⁹⁰ But many courts long have held to the contrary—that a consumer's contributory negligence should be irrelevant to a warranty claim which lies in contract or assumpsit,³⁹¹ particularly in cases involving defective food.³⁹² Many of the more recent cases take the same approach, holding that simple contributory negligence³⁹³ has no effect on a plaintiff's claim for breach of warranty.³⁹⁴

Prosser's study of the cases revealed that courts would not bar recovery on grounds of contributory negligence if a plaintiff's only fault lay in failing to inspect or discover a danger in a product, but "if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred."³⁹⁵ This is precisely the position taken in

Gimbel Bros., Inc., 24 N.E.2d 131, 133 (N.Y. 1939); Natale v. Pepsi-Cola Co., 182 N.Y.S.2d 404, 407 (App. Div. 1959).

390. See, e.g., Nicholson v. American Safety Util. Corp., 488 S.E.2d 240, 244 (N.C. 1997) (applying products liability statute); Cline v. Sawyer, 600 P.2d 725 (Wyo. 1979).

391. See, e.g., Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 485 (3d Cir. 1965) (applying Pennsylvania law); Jarnot v. Ford Motor Co., 156 A.2d 568, 573 (Pa. Super. Ct. 1959).

392. See, e.g., Kassouf v. Lee Bros., 26 Cal. Rptr. 276, 278 (Ct. App. 1962) (citing 2 HARPER & JAMES, THE LAW OF TORTS § 22.4, at 1210 (1956)) ("Contributory negligence, in general, is a defense only to actions grounded on negligence."). In *Kassouf*, after purchasing groceries including a Hershey "Mr. Goodbar" at defendant's food store, plaintiff sat down in a chair to read the newspaper beside a table on which she placed the candy bar. The court recounted:

While reading, she reached with one hand and took the candy bar from the table. Without looking, and with one hand, she opened one end of the wrapper and slid the bar partially out from it. Using this one-handed method, she broke off pieces, one after another, and put them into her mouth.

From the outset she noticed that the bar "didn't taste just right," but she assumed this was because she hadn't eaten all day. She had consumed about one third of the candy bar by the time she bit into a mushy worm. When she looked at the bar, she saw that it was covered with worms and webbing; worms were crawling out of the chocolate and the webbing had little eggs "hanging onto it."

Id. at 277. Sickened from ingesting the contaminated candy, plaintiff sued the grocery store for breach of warranty of merchantability, and the jury found for plaintiff. *Id.* Defendant appealed the trial court's refusal to instruct the jury that plaintiff had a duty "to take reasonable precautions for her own safety in the handling, inspection, and consumption" of the candy bar. *Id.* Affirming the trial court, the court held there is no duty to look at and feel a candy bar prior to biting into it. *Id.* at 278; cf. Coulter v. Am. Bakeries Co., 530 So. 2d 1009 (Fla. Ct. App. 1988) (finding comparative fault generally applicable to implied warranty claims, but, in case where metal wire in doughnut, sucking on doughnut while sipping milk, rather than chewing the doughnut properly, was not faulty conduct that could reduce recovery).

393. On the contributory negligence defense to products liability claims in tort, see *supra* Part II. "Simple" contributory negligence, negligently failing to discover or guard against the possibility of a defect, is to be distinguished from a plaintiff's assumption of risk in voluntarily, and perhaps unreasonably, encountering a known and appreciated danger. On the assumption of risk defense to products liability claims in tort, see *supra* Part III.

394. See Keaton v. A.B.C. Drug Co., 467 S.E.2d 558, 561 (Ga. 1996); Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1312 (Mass. 1988); Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1039 (Mass. 1983) (discussing comparative fault); Goulet v. Whitin Mach. Works, Inc., 568 N.E.2d 1158, 1160-61 (Mass. App. Ct. 1991); Wallace v. Owens-Illinois, Inc., 300 S.C. 518, 389 S.E.2d 155, 157 (Ct. App. 1989) (illuminating analysis by Bell, J.); Wood v. Bass Pro Shops, Inc., 462 S.E.2d 101, 103 (Va. 1995).

395. Prosser, *supra* note 297, at 839.

Restatement (Second) of Torts § 402A comment *n* for strict liability in tort.³⁹⁶ While there is some thin authority to the contrary,³⁹⁷ the courts quite widely agree that a plaintiff's negligent assumption of risk—his or her unreasonable decision to encounter a known and appreciated product danger—properly bars recovery in warranty as well.³⁹⁸

C. Misuse

Many courts have applied a misuse defense to warranty claims quite similar to how it is applied to products liability claims based in tort.³⁹⁹ Thus, early warranty cases denied recovery if the injury arose out of a product use not *intended* by the manufacturer.⁴⁰⁰ More recently, courts have limited the warranty of merchantability, which requires that products be “fit” for their “ordinary purposes,”⁴⁰¹ to uses that are reasonably *foreseeable*.⁴⁰² In other words, a seller's implied warranties do not extend to abnormal use, or unforeseeable misuse, whether by the user or another.⁴⁰³

396. See *supra* Part II.

397. See, e.g., *Wood v. Bass Pro Shops, Inc.*, 462 S.E.2d 101, 103 (Va. 1995) (noting that implied warranty actions are *ex contractu*, and holding that “the tort or *ex delicto* defense of assumption of the risk is not applicable in an action for breach of an implied warranty”; however, liability is barred if defect was “known, visible or obvious” to plaintiff).

398. Massachusetts has the most extensive jurisprudence on this point. See *Allen v. Chance Mfg. Co.*, 494 N.E.2d 1324, 1326-27 (Mass. 1986); *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033, 1039 (Mass. 1983); *Velleca v. Uniroyal Tire Co.*, 630 N.E.2d 297, 298 (Mass. App. Ct. 1994); *Barry v. Stop & Shop Cos.*, 507 N.E.2d 1062, 1065-66 (Mass. App. Ct. 1987) (finding that plaintiff's hand cut by rotating blade of lawn mower when she attempted to push misplaced baffle back into place). See *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317 (6th Cir. 1971) (applying Michigan law); *Hiigel v. Gen. Motors Corp.*, 525 P.2d 1198, 1200 (Colo. Ct. App. 1974), *rev'd on other grounds*, 544 P.2d 983 (Colo. 1975); *Brackett v. Johnson*, 273 A.2d 499 (Conn. Super. Ct. 1970) (finding that plaintiff placed hand in chute of snowblower he knew to be defective); *Williams v. Brown Mfg. Co.*, 261 N.E.2d 305 (Ill. 1970); *cf. Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir. 1997) (applying Virginia law and noting that liability barred if defect was “known, visible or obvious” to plaintiff, but ruling that obviousness was jury issue); *Epstein v. Eastman Kodak Co.*, 638 N.Y.S.2d 490, 491 (App. Div. 1996); *Gillespie v. Am. Motors Corp.*, 317 S.E.2d 32 (N.C. Ct. App. 1984) (finding that where buyers of vehicle complained of noxious fumes in passenger compartment immediately upon purchase, their contributory negligence in driving vehicle for three years thereafter, despite their doctor's advice not to ride therein, barred recovery in warranty for resulting injuries). See generally CLARK & SMITH, *supra* note 379, ¶ 12.03[8][b], at 12-17 to 12-18; WHITE & SUMMERS, *supra* note 379, § 11.8, at 408-09 (stating that “courts agree that the more specific form of contributory misconduct called ‘assumption of the risk’ bars a plaintiff's recovery in either strict tort or warranty,” consistent with *Restatement (Second) of Torts* § 402A cmt. n).

399. On the misuse defense to products liability claims in tort, see *supra* Part IV.

400. See *Preston v. Up-Right, Inc.*, 52 Cal. Rptr. 679, 682-83 (Ct. App. 1966); *Silverman v. Swift & Co.*, 107 A.2d 277, 281 (Conn. 1954); *Ross v. Diamond Match Co.*, 102 A.2d 858, 859-60 (Me. 1953); *Cheli v. Cudahy Bros. Co.*, 255 N.W. 414, 416 (Mich. 1934), *overruled on other grounds*, *Hill v. Husky Briquetting, Inc.*, 223 N.W.2d 290 (Mich. 1974). See generally *Levine, supra* note 379, at 643.

401. See U.C.C. § 2-314(2)(c) (1972); see *infra* V.D.

402. See *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 191 (1st Cir. 1980) (applying Massachusetts law).

403. See, e.g., *Watson v. Uniden Corp. of Am.*, 775 F.2d 1514 (11th Cir. 1985) (applying Georgia law and finding that plaintiff's use of product contrary to instructions is not use in a normal manner, when he forgot to switch from standby to talk, as manual instructed, before placing on ear); *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187, 190 (W.D. Va. 1997) (finding that misuse of product, defined as using it in manner which seller could not reasonably have foreseen, bars breach of warranty claims if misuse is sole proximate cause of harm); *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641,

For example, in *Venezia v. Miller Brewing Company*,⁴⁰⁴ a young boy's eye was injured when he threw a discarded Miller Beer bottle against a telephone pole, shattering the bottle. In his warranty claim against Miller and the bottle manufacturers for failing to make their bottles strong enough to withstand this type of use, the federal appeals court noted that the Massachusetts high court had previously found no breach of a warranty of merchantability where a plaintiff was injured by breaking glass while trying to pry the cover off a glass baby food jar with a beer can type of opener.⁴⁰⁵ While noting that "[t]he linchpin of the warranty claim . . . is thus the proper scope of the term ordinary purpose," and that "at first blush it might appear beyond dispute that throwing a glass container into a telephone pole is by no means an 'ordinary' use of that product,"⁴⁰⁶ the court observed that the Massachusetts high court had already rejected the "ordinary use" standard as being devoid of content for deciding misuse cases.⁴⁰⁷ Instead, the "manufacturer's warranty of product fitness for ordinary use includes a guarantee that such product will withstand, in a reasonably safe manner, foreseeable 'misuse' incident to or arising out of the product's intended use."⁴⁰⁸ Applying this standard, the court concluded that "it would be stretching too far to believe that the Massachusetts courts are presently prepared to expand their definition of 'ordinary purposes' to include the deliberate misuse of an otherwise reasonably safe container in a manner totally unrelated to any normal or intended use of that item *A fortiori*, we can see no possible implied fitness warranty that an empty glass bottle discarded by unknown persons would . . . safely withstand being intentionally smashed against a solid stationary object."⁴⁰⁹

D. U.C.C. Article 2

Since warranty law is now governed in every state by Article 2 of the Uniform Commercial Code,⁴¹⁰ a search for the proper role of user misconduct in warranty law should begin there. But the U.C.C.'s black-letter ("Official

650-51 (N.D. Miss. 1986) (holding that improper use negates both implied warranties of merchantability and fitness); *Daniell v. Ford Motor Co.*, 581 F. Supp. 728, 731-32 (D.N.M. 1984) (applying improper use rule to case where plaintiff, after locking herself in trunk in attempt to commit suicide, could not get out for nine days because of absence of internal release mechanism; use was highly extraordinary rather than "ordinary," and buyer did not think about, much less rely upon, seller's skill or judgment to select automobile suitable for her "unfortunate" purpose); *Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1342 (Ill. App. Ct. 1989) (citing UCC § 2-715, and observing that "[m]isuse arises as an issue which may defeat the action in whole or in part by contesting proximate cause"); *Carbone v. Alagna*, 658 N.Y.S.2d 48, 51 (App. Div. 1997) (finding that boy struck by projectile fired from friend's slingshot could not maintain implied warranty action against suppliers of slingshot); *Featherall v. Firestone Tire & Rubber Co.*, 252 S.E.2d 358, 367 (Va. 1979) (finding no recovery for breach of implied warranty if use was unforeseeable).

404. 626 F.2d 188, 189 (1st Cir. 1980) (applying Massachusetts law).

405. *Id.* at 190 (citing *Vincent v. Nicholas E. Tsiknas Co.*, 151 N.E.2d 263 (Mass. 1958)).

406. *Id.* at 189.

407. *See Back v. Wickes Corp.*, 378 N.E.2d 964, 968 (Mass. 1978).

408. *Venezia*, 626 F.2d at 190 (emphasis added).

409. *Id.* The court concluded that "the impact of endorsing a contrary conclusion would be overwhelming, with every discarded glass object holding the potential for generating a future lawsuit." *Id.* at 192.

410. *See* 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, ch. 4, at 120.

Text”) references to consumer misconduct are at best oblique—the scope of warranty liability is defined by whether a product is fit for “normal” use,⁴¹¹ by whether the buyer is probably aware of the product’s dangerous condition,⁴¹² and by whether a breach of warranty “proximately” results in the plaintiff’s injuries.⁴¹³

The warranty most frequently litigated in products liability cases, the implied warranty of merchantability, is principally defined in § 2-314(2)(c)’s provision that a merchantable product is “fit for the ordinary purposes for which such goods are used.”⁴¹⁴ This provision quite obviously suggests that an implied warranty of merchantability will *not* arise under this subsection⁴¹⁵ if a product’s performance capabilities are exceeded by a use which is not “ordinary,” however that word may be interpreted. Under § 2-316(3)(b), no warranties arise with respect to defects a buyer does or should discover during a pre-sale examination of a product.⁴¹⁶ Finally, the remedies provision of Article 2 includes, in defining the “consequential damages” available for breach of warranty in § 2-715(2)(b), “injury to person or property proximately resulting from any breach of warranty.”⁴¹⁷ While each of these provisions in Article 2 may be interpreted to implicate the role of a buyer’s misconduct in warranty litigation, none of them do so in a manner that is clear and to the point.

In contrast to the obscure manner in which buyer misconduct is treated in the U.C.C.’s Official Text, the Official Comments specifically address the effect of both a buyer’s carelessness and behavior which imply risk acceptance, framing the issue in terms of whether a buyer’s loss is “proximately caused” by a product defect or, alternatively, by the buyer’s choice or conduct. Comment 13 to § 2-314 provides in part:

In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense Action by the buyer following an examination of the goods which ought to have indicated the

411. See U.C.C. § 2-314(2)(c) (1972).

412. *Id.* § 2-316(3)(b).

413. *Id.* § 2-715(2)(b).

414. *Id.* § 2-314(2)(c); see 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 4:7.

415. Note that U.C.C. § 2-314(2) contains a total of six subsections, labeled (a)-(f), so that even if a product is merchantable under one or more subsections it may be found unmerchantable under one or more of the other provisions. So, if opening a Pepsi bottle on a metal fence causing it to explode is not an “ordinary purpose” under subsection (c), the bottle might still be unmerchantable for not being “adequately contained” under subsection (e). For such facts, see *Natale v. Pepsi-Cola Co.*, 182 N.Y.S.2d 404, 406 (App. Div. 1959).

416. See, e.g., *Light v. Weldarc Co.*, 569 So. 2d 1302, 1305 (Fla. Dist. Ct. App. 1990) (finding no implied warranty that safety glasses would not slip down user’s nose, and so fail to protect eye from metal sliver thrown from punch press, when user inspected glasses, knew their propensity to slip, and made “conscious decision” to buy them). See also 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 4:17, at 206.

417. U.C.C. § 2-715(2)(b) (1972).

defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.⁴¹⁸

Comment 8 to § 2-316 provides that “if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty.”⁴¹⁹ Comment 5 to § 2-715 provides more fully:

Subsection (2) (b) states the usual rule as to breach of warranty, allowing recovery for injuries “proximately” resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of “proximate” cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.⁴²⁰

This last comment imposes the greatest burden on buyers, for it states that there is no proximate cause, and hence no damages for breach of warranty, if a buyer either (1) unreasonably fails to inspect a product for defects or (2) uses a product after discovery of a defect, whether such use was unreasonable or not.

*Erdman v. Johnson Brothers Radio & Television Company*⁴²¹ illustrates one court’s attempt to harmonize the awkward fit between a plaintiff’s contributory negligence and the law of warranty. From the start, the plaintiffs’ television-radio-stereo console purchased from the defendant emitted crackling sounds, often accompanied by a tear in the picture, and it sometimes emitted “sparks and heavy smoke shooting out of the back of the set and the smell of burning rubber, wire, or some other substance.”⁴²² The defendants purported to repair the problem, but sparks and smoke still emanated from the rear of the television.⁴²³ After one of these recurring episodes, the plaintiffs turned off (but did not unplug) the television, went to bed, and were later awakened by a fire from the set that destroyed their house.⁴²⁴ In plaintiffs’ warranty and negligence action against the dealers, the trial court ruled for the defendants, finding that the plaintiffs had been contributorily negligent in continuing to use a television that was arcing, smoking, and emitting sparks and a burning odor for two hours on the night of the fire.⁴²⁵ The court concluded that the implied warranty of

418. U.C.C. § 2-314 cmt. 13.

419. U.C.C. § 2-316 cmt. 8, at 89.

420. *Id.* § 2-715 cmt. 5.

421. 271 A.2d 744 (Md. 1970).

422. *Id.* at 745.

423. *Id.*

424. *Id.* at 746.

425. *Id.* at 747.

merchantability did not cover the continued use of a television under these conditions since such was not a "normal" use.⁴²⁶

On appeal, the Maryland high court affirmed. Pondering whether contributory negligence is a bar to an implied warranty claim under the Uniform Commercial Code, on the one hand, or falls outside the scope of the seller's implied warranty, on the other, the *Erdman* court observed that "[t]he important factor under either theory or an amalgam of them is that, although there may have been a breach of the warranty, that the breach is no longer considered 'the proximate cause of the loss.'"⁴²⁷ Thus, "the defect in the set, of which the plaintiffs had knowledge, could no longer be relied upon by them as a basis for an action of breach of warranty."⁴²⁸ The court concluded that "the breach of warranty, if any there was, was not the proximate cause of the fire because of the appellants' continued use of the set after the discovery of the obvious defects,"⁴²⁹ remarking "that such a holding is consistent with the trial judge's characterization of the plaintiffs' conduct as contributory negligence and with the U.C.C.'s Official Comment 13 to § 2-314, and Comment 5 to § 2-715."⁴³⁰

Despite the specificity of the U.C.C.'s Official Comments on how buyer misconduct affects a warranty claim, *Erdman* is one of the few decisions that analyzes these useful comments together with the vague black-letter provisions to resolve the user misconduct issue in a warranty case. Why most courts have failed to use Article 2's misconduct comments in a similarly forthright manner might be because the courts have sensed the rough manner in which the contract law scholars who drafted Article 2 incorporated the tort law concepts of contributory negligence, assumption of risk, misuse, and proximate cause into the warranty law context. Or perhaps the courts, feeling bound only by the U.C.C.'s Official Text, have largely ignored the comments to provide more flexibility in their effort to standardize the misconduct defenses applicable to all products liability claims, in tort and warranty alike. Finally, beginning in the late 1960s, courts increasingly may have perceived that the all-or-nothing approach to buyer misconduct exhibited by the comments is inconsistent with the modern comparative fault approach to damages apportionment that swept the nation in the late twentieth century.⁴³¹

The infrequency with which the courts have used the U.C.C.'s black-letter provisions to decide consumer misconduct cases is more problematic. Certainly the paucity of this type of analysis is partially explained by the vague and indirect manner in which these provisions refer to buyer misconduct in terms of ordinary use, discovery of defects, and proximate

426. The trial judge remarked in part:

"You have a man of high intelligence, who purchased this television set, who continued to use it, even though he knew and had complained that it was arcing, smoking, with actual sparks and a burning odor. Now using a set which is in that condition is certainly not, in my opinion, a use in a normal manner I so hold that, even assuming the fire came about as a result of a defect in the set, that the warranty did not extend to the point, under the circumstances of this case, of covering the Plaintiff's damages resulting from the fire."

Id. at 747 (quoting trial judge's opinion).

427. *Id.* at 749 (quoting U.C.C. § 2-314 cmt. 13).

428. *Id.*

429. *Id.* at 750.

430. *Id.* at 750-51.

431. See 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 15.

causation. Moreover, because this Official Text did not explicitly address the subject of buyer misconduct, the enactment of the U.C.C. did not displace prior law, nor did it interfere with the ongoing development of supplementary law, on how a buyer's misconduct should affect a warranty claim.⁴³² Thus, courts may have felt authorized by the U.C.C. itself to substitute developing principles of consumer misconduct from the tort law context for the rough, vague, and increasingly anachronistic provisions of Article 2.

Since warranty law claims in most products liability actions are secondary to overlapping claims of strict liability in tort and negligence, many courts and lawyers may simply view these liability claims collectively as lying essentially in tort and so may view the defenses from the same perspective. While the temptation to view tort and warranty claims as falling under a single "products liability action" umbrella for purposes of evaluating available defenses is understandable, it improperly denigrates the legislative prerogative. Until the legislatures themselves choose to unify tort and warranty claims in products liability litigation, as a couple now have done,⁴³³ the courts should clarify how differing forms of consumer misconduct affect claims and damages for breach of warranty under Article 2 of the Uniform Commercial Code.

E. Express Warranty

Much of the analysis above applies to express as well as implied warranty claims. But express warranties arise from *explicit* contractual representations, and so the issue of whether a representation was part of the basis of the particular bargain (or whether a plaintiff justifiably relied thereon) is an issue that cannot be ignored.⁴³⁴

One special doctrine that has developed in some of the express warranty cases is that contributory negligence is irrelevant if the plaintiff's "misconduct" consists merely in relying on the truthfulness of the defendant's representation. *Hensley v. Sherman Car Wash Equipment Co.*⁴³⁵ was an action by a car wash employee against the manufacturer of the automobile conveyor unit. On the day of the accident, the pivoting safety hood which ordinarily covered the open pit at the end of the conveyor was not operating, and the plaintiff stepped into the pit. The plaintiff's express warranty claim was based on the assertion in the defendant's information sheet that "[c]ar wash personnel are assured safe working conditions on all areas of the vehicle by the pivoted safety hood . . . [which] eliminates all possibility of persons stepping into an open pit."⁴³⁶ Holding that the plaintiff's contributory negligence was not a bar to her express warranty claim, the court reasoned that the plaintiff's faulty behavior in failing to observe where she was going was "within the scope of the risk warranted against by defendant," since the stated "purpose of the safety hood was to prevent a person from stepping into

432. See U.C.C. § 1-103 (1972).

433. See CONN. GEN. STAT. ANN. § 52-572n(a) (1991); MICH. COMP. LAWS ANN. § 600.2945 (West 2000). Note, however, that some states treat express warranty claims as generating special responsibilities and so exclude them from the general definition of a "product liability action." See, e.g., N.J. REV. STAT. § 2A:58C-1(b)(3) (1987).

434. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, §§ 4:2-4, at 122.

435. 520 P.2d 146 (Colo. Ct. App. 1974).

436. *Id.* at 147.

the opening at the end of the conveyor unit.”⁴³⁷ Accordingly, “[t]he very risk which defendant warranted not to exist was encountered by plaintiff, and her negligence or lack of due care is irrelevant.”⁴³⁸ Indeed, a person’s “fault” in believing a manufacturer’s express promise should only rarely be allowed to undercut the manufacturer’s fundamental obligation to speak the truth.⁴³⁹ Other courts have agreed with *Hensley* that a plaintiff’s contributory negligence will not bar a breach of express warranty claim if the misconduct merely “puts the warranty to the test.”⁴⁴⁰

F. Comparative Fault

Only in recent decades have courts and legislatures realized that a plaintiff’s misconduct and damages need not be treated in an all-or-nothing manner.⁴⁴¹ Today, whether consumer misconduct should be considered a matter of comparative fault for damages apportionment on a warranty claim depends upon the scope of each particular jurisdiction’s comparative fault system.⁴⁴² While the development of the comparative fault doctrine is generally beneficial, it has magnified the profound confusion that already existed in fashioning a proper role for user misconduct in warranty litigation.

In states which have enacted “comparative negligence” legislation, courts have been properly hesitant to compare a user’s misconduct with a defendant’s breach of warranty.⁴⁴³ But in states with legislation which has defined the apportionment system more broadly in terms of comparative “fault”⁴⁴⁴ or “culpability,”⁴⁴⁵ especially if “fault” is defined to include breach

437. *Id.* at 148.

438. *Id.*

439. See generally Owen, *supra* note 293, at 463-65.

440. *Hensley*, 520 P.2d at 148. See *Brown v. Chapman*, 304 F.2d 149, 153 (9th Cir. 1962) (applying Hawaii law); *Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254, 258 (6th Cir. 1960) (“If the manufacturer chooses to extend the scope of his liability by certifying certain qualities as existent, the negligent acts of the buyer, bringing about the revelation that the qualities do not exist, would not defeat recovery.” (quoting *Hanson v. Firestone Tire & Rubber Co.*, 276 F.2d 254, 258 (1960))); *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 609, 216 S.E.2d 532, 534 (S.C. 1975).

441. Perhaps the earliest products liability case in which the court allowed the jury to reduce the plaintiff’s recovery for breach of implied warranty on account of contributory negligence, rather than to bar recovery altogether, was *Chapman v. Brown*, 198 F. Supp. 78, 86 (D. Haw. 1961), *aff’d*, 304 F.2d 149 (9th Cir. 1962). A helpful, early discussion favoring comparative fault apportionment in warranty cases is Levine, *supra* note 379.

442. See generally WOODS & DEERE, *supra* note 5, §§ 14:16-17, at 336-39.

443. See, e.g., *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834, 837 (Wyo. 1991) (“[T]he statute applies only to causes of action arising out of appellee’s negligence . . .”). But see *Larsen v. Pacemaker Sys., Inc.*, 837 P.2d 1273, 1289 (Haw. 1992) (“merging” breach of implied warranty into pure apportionment products liability scheme). In some jurisdictions, warranty claims may plausibly be included under the “comparative negligence” umbrella:

It can be argued that most comparative negligence statutes by using only the term ‘negligence’ intend to exclude warranty actions. This argument is very tenuous in a jurisdiction recognizing contributory negligence as a defense. It may have some force in a state which has never recognized contributory negligence as a defense to warranty . . .

WOODS & DEERE, *supra* note 5, § 14:16, at 336.

444. As in Colorado. See *Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414, 1419 (10th Cir. 1996) (interpreting products liability apportionment statute, COLO. REV. STAT. ANN. § 13-21-406 (2000), to permit comparison of driver’s fault with automotive manufacturer’s fault in designing defective seatbelt).

445. See N.Y. C.P.L.R. art. 14-A § 1411 (McKinney 1999).

of warranty⁴⁴⁶ or something similar,⁴⁴⁷ or when the statute provides for apportionment in all cases involving personal injury, death, or damage to property,⁴⁴⁸ then courts may or must include breach of warranty as an item to be apportioned.⁴⁴⁹ In the two states that have adopted the Uniform Comparative Fault Act,⁴⁵⁰ breach of warranty is explicitly included as a type of "fault" to be apportioned.⁴⁵¹ Some state legislatures have enacted special products liability reform statutes that explicitly provide for the comparative fault apportionment of damages in products liability actions generally, regardless of the basis of the claim.⁴⁵² Finally, in a number of the ten or so jurisdictions where comparative fault apportionment is a creature of the common law, the courts have generally chosen to include breach of warranty in the apportionment system.⁴⁵³

A variety of secondary comparative fault issues arise in connection with warranty claims involving user misconduct. In the majority of comparative fault states that have adopted a "modified" rather than "pure" system of comparative fault, a plaintiff's contributory fault continues to bar recovery altogether, in warranty as in tort, when the plaintiff's fault exceeds the defendant's fault.⁴⁵⁴ When comparative fault statutes specify apportionment for claims of personal injury and property damage, such statutes may not be applied to breach of warranty actions seeking recovery of purely economic loss.⁴⁵⁵

For the many reasons why damages apportionment principles are widely applied to products liability claims in tort,⁴⁵⁶ a division of damages based on responsibility in warranty is also sound in principle. Because treating plaintiff misconduct as a basis for apportioning damages was largely nonexistent when the Uniform Commercial Code was drafted in the 1950s, Article 2 fails to

446. See ARK. CODE ANN. § 16-64-122(c) (Michie 1987 & Supp. 1999).

447. In Maine "fault" includes a "breach of statutory duty." See ME. REV. STAT. ANN. tit. 14, § 156 (West 1964).

448. See MISS. CODE ANN. § 11-7-15 (1972 & Supp. 2000); R.I. GEN. LAWS § 9-20-4 (1997); Fiske v. MacGregor, 464 A.2d 719, 726-729 (R.I. 1983) (providing thorough analysis of case law).

449. See generally WOODS & DEERE, *supra* note 5, § 14:16.

450. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 123 (1996). Iowa and Washington are the only two states that have adopted the Act.

451. Under § 1(b) of the Act, "fault" is defined to include "breach of warranty." See *id.* at 127.

452. See *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164, 165-66 (6th Cir. 1983) (applying Michigan law); TEX. CIV. PRAC. & REM. CODE ANN. § 82.001 (1985).

453. See, e.g., *Sebring v. Colver*, 649 P.2d 932, 935 (Alaska 1982); *Coulter v. American Bakeries Co.*, 530 So. 2d 1009 (Fla. Dist. Ct. App. 1988); *Wheeler v. Sunbelt Tool Co., Inc.*, 537 N.E.2d 1332, 1341 (Ill. App. Ct. 1989); *In re Certified Questions from the United States Court of Appeals for Sixth Circuit*, 331 N.W.2d 456, 459 (Mich. 1982); *Owens v. Truckstops of Am.*, 915 S.W.2d 420, 434 (Tenn. 1996).

454. See, e.g., *Interwest Constr. v. Palmer*, 886 P.2d 92, 100 (Utah Ct. App. 1994).

455. See *Ethyl Corp. v. BP Performance Polymers, Inc.*, 33 F.3d 23, 25 (8th Cir. 1994) (applying Iowa law); *Little Rock Elec. Contractors, Inc. v. Okonite Co.*, 744 S.W.2d 381, 382 (Ark. 1988) (holding no apportionment where statute applied to "actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault," not because implied warranty was not a form of "fault," but because of type of loss sustained); see also *Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492, 501 (1st Cir. 1994) (applying New Hampshire law and holding that comparative fault not applicable as defense to warranty liability "except in personal injury cases based on dual theories of strict liability in tort and breach of the implied warranty of merchantability").

456. See 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 5, ch. 15.

address the topic. But Article 2's formulation of buyer misconduct issues in proximate causation terms is compatible with the concept of damages apportionment which assigns responsibility for damages to each party in proportion to the extent to which the party's breach of duty proximately caused the harm.⁴⁵⁷

The widening application of comparative fault principles to warranty actions has occurred mostly in the context of *implied* warranty claims, and there has been a greater reluctance to apply damages apportionment principals to claims for *express* warranty.⁴⁵⁸ But the several comparative fault statutes that apply to injury claims generally, together with the products liability statutes that apply comparative fault provisions to all products liability claims, would seem quite clearly to embrace express warranty claims within the ambit of comparative responsibility. However, jurisdictions without these statutes generally should not reduce a plaintiff's damages on account of simple contributory fault, for such behavior usually consists in merely putting the warranty to the test. More egregious misconduct, however, particularly if it involves plaintiff conduct which is knowingly dangerous and unreasonable, or puts a product to an unforeseeable use, unfairly tests the product outside the warranty and so should continue to bar express warranty recovery altogether.

While damages apportionment for consumer misconduct in implied warranty cases is sound as a principle of general application, it needs exceptions. No doubt some forms of consumer misconduct, such as knowingly dangerous and unreasonable behavior and putting products to unforeseeably dangerous use, should be left entirely outside the area of damages apportionment for all warranty claims. Regardless of how user misconduct is characterized, the issue of damages apportionment needs to be addressed only if the product use was within the scope of warranty. And for most products liability claims involving user misconduct, in warranty no less than tort, courts should leave room for a robust doctrine of "sole proximate cause"⁴⁵⁹ which is often better treated as an issue of "scope of warranty."⁴⁶⁰ Both doctrines embrace the same notion that there must be a fair limit to a seller's responsibility, such that both express and implied promises are reasonably construed to exclude responsibility for injuries resulting from the use of a product outside the scope of a warranty.

457. See, e.g., *Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1256 (Ill. 1988). See generally Levine, *supra* note 379, at 663 (arguing that comparative fault approach "while not a panacea, can serve to substantially ameliorate the harshness of the contributory negligence doctrine while balancing the manufacturer's responsibility to society with the buyer's action in contributing to his injury").

458. "Contributory negligence has never been an available defense in cases involving express warranties." *Ferdig v. Melitta, Inc.*, 320 N.W.2d 369, 374 (Mich. Ct. App. 1982).

459. See, e.g., *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187, 190 (W.D. Va. 1997) (holding that misuse of product, defined as "using it in manner which the seller could not reasonably have foreseen," bars breach of warranty claims if misuse is sole proximate cause of harm).

460. See, e.g., *Erdman v. Johnson Bros. Radio & Television Co.*, 271 A.2d 744, 749 (Md. 1971). See NORDSTROM, *supra* note 379, § 84. Professor Nordstrom viewed the user misconduct issue as a question of the nature of the agreement between the parties, addressed in Article 2 in terms of whether the goods "conformed" to the warranty. See U.C.C. § 2-106(2) (1972). In view of Nordstrom's focus on the intent of the parties and the nature of their agreement, he preferred among tort law terms the concept of assumption of risk to the vaguer concept of proximate cause. See NORDSTROM, *supra* note 379, § 84.

As an example, assume that a new sport utility vehicle has a high center of gravity, a narrow track width, and a large bubble visible on the sidewall of one tire, and further assume that the buyer is aware of these obvious characteristics of the vehicle. If the buyer chooses to turn the steering wheel sharply at high speed in an effort to spin the vehicle sideways like a movie stuntman, the tire might blow out and the vehicle might roll over, injuring the driver. In such a case, although the tire is clearly defective, and while the safety of the vehicle's stability may fairly be subject to inquiry, the sole proximate cause of the driver's injuries should probably be viewed as the driver's harsh driving rather than any lack of merchantability in the tire or the vehicle. Stated otherwise, the scope of the implied warranty of quality in such a case does not include safe performance when the product is put to such abusive use. The issue of comparative fault should never be reached at all in such a case, because there was no proximate connection between breach of warranty and the plaintiff's harm.

VI. DEFENSES TO MISREPRESENTATION CLAIMS

A. In General

The basic misconduct "defense" asserted in tortious misrepresentation actions is that the plaintiff's reliance, if any, was not "justifiable."⁴⁶¹ Indeed, the justifiability of reliance, sometimes referred to as "reasonable reliance" or the "right to rely,"⁴⁶² has long been a central element of all three forms of tortious misrepresentation, including fraud,⁴⁶³ negligent misrepresentation,⁴⁶⁴ and strict products liability in tort for misrepresentation under the *Restatement*

461. See generally 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 7.8 (2d ed. 1986); PROSSER & KEETON ON TORTS, *supra* note 50, § 109; James B. Sales, *The Innocent Misrepresentation Doctrine: Strict Tort Liability Under Section 402B*, 16 HOUS. L. REV. 239 (1979); Gary Massey, Jr., Comment, *Interpreting the Restatement of Torts Section 402B After the Changes to Section 402A*, 28 CUMB. L. REV. 177 (1997-98).

462. The dominant term is "justifiable." See RESTATEMENT (SECOND) OF TORTS §§ 402B, 537(b), 538(1), 552. The *Restatement (Third) of Torts: Products Liability* does not really address the issue. See RESTATEMENT (THIRD) OF TORTS § 9 cmt. b (1998) (adopting the principles of RESTATEMENT (SECOND) OF TORTS § 402B); *id.* § 9 cmt. c (1998) (referring only to the issue of "contributory fault"); *id.* § 9, reporters' notes 1 & 2 (referring to § 402B's requirement of "justifiable reliance"). But other terms are used as well, sometimes interchangeably. See, e.g., *G & M Farms v. Funk Irrigation Co.*, 808 P.2d 851, 855 (Idaho 1991) (stating eighth element of fraud claim as plaintiff's "right to rely thereon"); *IFD Constr. Corp. v. Corddry Carpenter Dietz & Zack*, 685 N.Y.S.2d 670, 673 (App. Div. 1999) (stating that reliance was "neither reasonable nor justified"); *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 407 S.E.2d 860, 863 (N.C. Ct. App. 1991) (discussing "justifiable reliance" and "reasonable reliance"); RESTATEMENT (SECOND) OF TORTS § 310 cmt. b (1965) (relying on an opinion may make the person's reliance "less reasonable, and so less justified."); 37 AM. JUR. 2d *Fraud & Deceit* § 236 (1968) (classifying issue as plaintiff's "right to rely" and examining basis for ascertaining whether reliance is "justifiable or excusable"). Except perhaps on the issue of whether a victim's conduct should be measured objectively or subjectively, discussed below, it matters little which term a court selects to characterize the form of misconduct which will defeat a claim for tortious misrepresentation.

463. See RESTATEMENT (SECOND) OF TORTS § 537(b) (1977). Although § 537 by its terms applies only to recovery for pecuniary loss, § 557A applies the principles of liability in deceit for pecuniary loss to cases in which the deceit causes physical harm. RESTATEMENT (SECOND) OF TORTS § 557A cmt. a (1977).

464. See RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

*(Second) of Torts*⁴⁶⁵ and the *Restatement (Third) of Torts: Products Liability*.⁴⁶⁶

Probably because the justifiability of a plaintiff's reliance overlaps several other elements of fraud (fact, materiality, plaintiff's ignorance of falsity, and reliance), as discussed below, it is sometimes omitted in recitations of the elements of fraudulent⁴⁶⁷ and negligent misrepresentation.⁴⁶⁸ This omission might be viewed as suggesting that there exists some uncertainty as to whether the justifiability of a plaintiff's reliance is truly an element of a tortious misrepresentation claim or whether instead a plaintiff's unjustified reliance should be considered an affirmative defense. But the omission is to be explained by its embedded nature in the other elements, and there is essentially no debate that the justifiability of a plaintiff's reliance is an essential component of a common-law⁴⁶⁹ claim for tortious misrepresentation.⁴⁷⁰

As a component of all three causes of action for tortious misrepresentation, the justifiability of reliance cannot be characterized as an affirmative defense because the plaintiff in all such cases has the burden, as with each element of such claims, to plead and prove the justifiability of the reliance upon the defendant's misrepresentation.⁴⁷¹ If a plaintiff is unable to prove that the reliance was justifiable, the tortious misrepresentation claim will fail.⁴⁷² Similar to the other misconduct defenses examined in this Article,

465. *Id.* § 402B. *See id.* cmt. j.

466. Section 9 of the *Products Liability Restatement* incorporates the doctrine of § 402B of the *Second Restatement*. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 cmt. b (1998).

467. *See, e.g.,* Bank of Montreal v. Signet Bank, 193 F.3d 818 (4th Cir. 1999) (applying Virginia law); Small v. Lorillard Tobacco Co., 698 N.Y.S.2d 615, 621 (Ct. App. 1999) ("To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury."); Sturgeon v. Retherford Publications, Inc., 987 P.2d 1218, 1228 (Okla. Ct. App. 1999). *See also* 1 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 2.05 [2], at 2-55 (Cary Sklarer rev. ed. 1999) (characterizing element merely as "reliance upon the truth of the representation").

468. *See* RESTATEMENT (SECOND) OF TORTS § 310 (1965).

469. Justifiable reliance is not a required element of certain statutory claims for deceptive business practices and consumer fraud. *See* Gennari v. Weichert Co. Realtors, 691 A.2d 350, 364-65 (N.J. 1997); Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 599 (App. Div. 1998), *aff'd*, 698 N.Y.S.2d 615 (1999).

470. *See* Am. Safety Equip. Corp. v. Winkler, 640 P.2d 216, 223 (Colo. 1982); Boyd v. A. O. Smith Harvestore Prods., Inc., 776 P.2d 1125, 1129 (Colo. Ct. App. 1989) ("An essential element of both fraud and negligent misrepresentation is justifiable reliance."); Gawloski v. Miller Brewing Co., 644 N.E.2d 731, 734 (Ohio Ct. App. 1994). *But see* Phinney v. Perlmutter, 564 N.W.2d 532, 546-48 (Mich. Ct. App. 1997) (narrowly reasoned and not a products liability case), *rejected by* Novak v. Nationwide Mut. Ins. Co., 599 N.W.2d 546, 554 (Mich. 1999) ("[A] person who *unreasonably* relies on false statements should not be entitled to damages for misrepresentation . . .").

471. *See, e.g.,* Am. Safety Equip. Corp., 640 P.2d at 223 (holding by implication that justifiable reliance cannot be characterized as an affirmative defense); *cf.* Kruse v. Bank of Am., 248 Cal. Rptr. 217 (Ct. App. 1988) (holding that fraud pleading insufficient without allegations of justifiable reliance). *See generally* 37 AM. JUR. 2D FRAUD & DECEIT § 435 (1968) (disclosing plaintiff generally has the duty to plead a right to rely).

472. *See, e.g.,* Baker v. Danek Medical, 35 F. Supp. 2d 875, 878 (N.D. Fla. 1998) (finding negligence and strict liability for misrepresentation); Gunsalus v. Celotex Corp., 674 F. Supp. 1149, 1160 (E.D. Pa. 1987) (dismissing claims against tobacco companies for fraud, negligence, and strict liability for misrepresentation on ground that advertisements at issue "are not the kind of representations upon which reasonable people would rely"); Am. Safety Equip. Corp., 640 P.2d at 223 (4-3 decision) (strict liability); Gawloski, 644 N.E.2d at 736 (fraudulent misrepresentation: no justifiable reliance as a matter of law).

the justifiability of a plaintiff's reliance is normally a question of fact for the jury to resolve.⁴⁷³

B. Justifiability of Reliance

Whether a plaintiff's reliance is justifiable depends upon the nature of the representation and all of the circumstances of the particular transaction. These include the materiality of the representation;⁴⁷⁴ the extent to which it was precise and factual, on the one hand, or vague and subjectively a matter of opinion, on the other;⁴⁷⁵ its form and the context in which it was made, as in television advertising, face-to-face negotiations, or in the owner's manual;⁴⁷⁶ its apparent plausibility, or its suspiciousness suggesting that the plaintiff should "smell a rat";⁴⁷⁷ the availability of other sources of information revealing the falsity of the representation;⁴⁷⁸ and any other matter bearing on

473. See *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 407 S.E.2d 860, 863 (N.C. Ct. App. 1991).

474. Section 538 of the *Restatement (Second) of Torts* provides that "[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material," and it defines a matter as "material" if:

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

RESTATEMENT (SECOND) OF TORTS, § 538 (1977).

475. See PROSSER & KEETON ON TORTS, *supra* note 50, § 109, at 755.

476. Cf. RESTATEMENT (SECOND) OF TORTS, § 538A, cmt. c (1977).

477. *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1041 (7th Cir. 1990) (Ill. law). Thanks to Judge Posner for this colorful phrase.

478. See *Gawloski v. Miller Brewing Co.*, 644 N.E.2d 731 (Ohio Ct. App. 1994) (finding that even if Miller beer commercials had represented that prolonged and excessive beer drinking was safe, no justifiable reliance as a matter of law because of common awareness for centuries of risks of alcoholism from prolonged and excessive consumption of alcohol). The court in *Gawloski* remarked:

Our nation continues to inform its citizens of those dangers, supporting the community's common knowledge with well-documented and highly publicized scientific and statistical information that repeatedly warns of the detrimental physical, psychological, and emotional effects caused by prolonged and excessive alcohol use. Even though we acknowledge that beer advertising is pervasive in our society, we hold that, as a matter of law, a beer manufacturer's commercial images, although enticing, are not enough to neutralize or nullify the immense body of knowledge a reasonable consumer possesses about the dangers of alcohol. Therefore, a reasonable consumer could not, as a matter of law, ignore basic common knowledge about the dangers of alcohol and justifiably rely upon beer advertisements and their idyllic images to conclude that the prolonged and excessive use of alcohol is safe and acceptable.

Id. at 736. Cf. *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 600 (App. Div. 1998), *aff'd*, 698 N.Y.S.2d 615 (1999). In *Small* the court decertified a class action against the tobacco industry for fraudulently concealing the addictive nature of cigarette smoking, questioning the plausibility of plaintiff's claim of reliance because of the hundreds of articles published in New York newspapers during the 1980s and 1990s about nicotine addiction.

whether in the circumstances the plaintiff, or a reasonable person,⁴⁷⁹ could properly believe and base a decision upon the representation.⁴⁸⁰ So, a court or jury may conclude that a person can reasonably believe explicit assurances that a golfing practice device is “completely safe” and that the “ball will not hit player,”⁴⁸¹ or that a mace weapon sold for self defense “*disables as effectively as a gun*” and will “*subdue*” an attacker “*instantly*,”⁴⁸² whereas a person, ignoring widespread publicity about the evils of drinking and smoking, may *not* justifiably base personal beer or cigarette consumption decisions upon commercials that glorify drinking or smoking and that somehow convey the idea that the prolonged and excessive consumption of such products is not harmful or addictive.⁴⁸³

Reliance itself, apart from its justifiability, involves the entirely factual subjective question of whether the representee personally believed the representation and took action, at least in part, upon it.⁴⁸⁴ In contrast, the *justifiability* of that reliance requires an evaluation of the basis for reliance to determine if it was sound or had at least some sensible explanation. Because it gauges the wisdom of a plaintiff's decision to rely upon a particular representation, the justifiability of reliance is often said to be based upon an

479. The standard for establishing justifiability of reliance for fraud is tailored to the knowledge and characteristics of the specific plaintiff, in contrast to the objective reasonable person standard for negligent and innocent misrepresentation. See *infra* text accompanying notes 482-87.

480. Representative factors to be considered in evaluating the justifiability of a plaintiff's reliance upon a defendant's fraudulent representations are set forth in *Sippy v. Cristich*, 609 P.2d 204 (Kan. Ct. App. 1980), an action brought by home purchasers alleging the seller's concealment of a defective roof:

Many factors must be considered in determining whether a statement is a matter of fact or matter of opinion and whether or not plaintiff has a right to rely on the statement. Among the facts the court will take into consideration are the intelligence, education, business experience and relative situation of the parties; the general information and experience of the persons involved as to the nature and use of the property; the habits and methods of those in the industry or profession involved; the opportunity for both parties to make an independent investigation as well as the nature, extent, and result of any investigation so made; and any contract the parties knowingly and understandingly entered into. . . . “A recipient of a fraudulent misrepresentation is justified in relying upon its truth without investigation, unless he knows or has reason to know of facts which make his reliance unreasonable” . . . [T]he test is whether the recipient has “information which would serve as a danger signal and a red light to any normal person of his intelligence and experience.”

Id. at 208 (quoting from, *inter alia*, *Restatement (Second) of Torts* § 540 and comments thereto).

481. *Hauter v. Zogarts*, 534 P.2d 377, 379 (Cal. 1975).

482. *Klages v. General Ordnance Equip. Corp.*, 367 A.2d 304, 306 (Pa. Super. Ct. 1976).

483. See *Small*, 679 N.Y.S.2d at 600; *Gawloski*, 644 N.E.2d at 736; *Smith v. Anheuser-Busch, Inc.*, 599 A.2d 320 (R.I. 1991). Cf. *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 845-46 (W.D. Ky. 1999). In *Hill* the defendant moved to dismiss the fraud claim on grounds that the dangers of smoking were common knowledge. The court denied the motion. Common knowledge is no defense to fraud, and it applies thereto, “if at all, by undermining proof of justified reliance upon misinformation” which the fact-finder should compare to the “convincingness” of the misrepresentation. While common knowledge does not “automatically negate the justifiability of reliance,” it “introduces a powerful argument against reasonableness” which is more appropriately considered on a motion for summary judgment than on a motion to dismiss. *Id.* at 846.

484. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 3:2, at 89.

"objective" determination.⁴⁸⁵ In cases involving the intentional tort of fraud, however, the standard differs from the normal objective standard of a reasonable prudent person, since the gullibility or other fault of a person in believing such a misrepresentation cannot in fairness bar a claim against an intentional deceiver who deliberately and shamelessly exploits a person's trust.⁴⁸⁶ In such cases "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases."⁴⁸⁷ Normally, a person *may* justifiably rely upon a fraudulent misstatement unless the falsity of the representation is so clear, based on the known or obvious facts, as to place in doubt the person's own truthfulness, or possibly even sanity, in claiming to have relied upon it.⁴⁸⁸ In reality, tailoring the justifiability criteria to the plaintiff's specific characteristics makes the standard look suspiciously subjective,⁴⁸⁹ such that it might be best if the courts in fraud cases would abandon pounding and twisting the justifiability standard into an "objective" hole in which it does not fit.

485. See, e.g., *Gawloski*, 644 N.E.2d at 736. See generally PROSSER & KEETON ON TORTS, *supra* note 50, § 108, at 750 (arguing that purpose of justifiable reliance requirement is for "providing some objective corroborations to plaintiff's claim that he did rely").

486. See RESTATEMENT (SECOND) OF TORTS § 545A (1972) ("One who justifiably relies upon a fraudulent misrepresentation is not barred from recovery by his contributory negligence in doing so."). "Although the plaintiff's reliance on the misrepresentation must be justifiable . . . this does not mean that his conduct must conform to the standard of the reasonable man." *Id.* cmt. b. This is the prevailing rule, but there is authority to the contrary. See generally 37 AM. JUR. 2D *Fraud & Deceit* § 249 (1968).

487. RESTATEMENT (SECOND) OF TORTS § 545A cmt. b. Not unlike the child standard of care in the law of negligence, the standard of justifiability for fraud is often said to conform to the particular attributes of the plaintiff, including his or her age, intelligence, experience, and mental and physical condition. See *Cheney Bros. v. Batesville Casket Co.*, 47 F.3d 111, 115 (4th Cir. 1995) (applying South Carolina law).

488. See PROSSER & KEETON ON TORTS, *supra* note 50, § 108:

Rather than contributory negligence, the matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case, and so comes closer to the rules which are associated with assumption of risk. "More succinctly stated, the rule is that one cannot be heard to say he relied upon a statement so patently ridiculous as to be unbelievable on its face, unless he happens to be that special object of the affections of a court of Equity, an idiot."

Id. at 751 (quoting *Obiter Dicta*, 25 FORD. L. REV. 395, 397 (1956)). Cf. *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1041-42 (7th Cir. 1990) (applying Illinois law) (Posner, J.), *overruled on other grounds by* *Roboserve, Inc. v. Kato Kaga Ku Co.*, 78 F.3d 266 (11th Cir. 1996). Judge Posner stated:

We think it comes down to this: while the victim of an ordinary accident is required to use the ordinary care of an average person [to avoid being contributorily negligent] . . . the victim of a deliberate fraud is barred only if he has notice of the fraud, and so he need only avoid *deliberate* or *reckless* risk-taking.

Id. at 1041. Thus, a fraud victim "cannot close his eyes to a known risk," for that would be to "ignore a manifest danger," which would be reckless. *Id.* at 1042.

489. So, justifiability might be said to lie closer to assumption of risk than it does to contributory negligence. See *AMPAT/Midwest, Inc.*, 896 F.2d at 1042 ("It differs by only a shade, if that, from . . . assumption of risk that defeats liability under the first aspect of the duty of reasonable reliance as we conceive it."); PROSSER & KEETON ON TORTS, *supra* note 50, § 108.

The justifiability requirement is not designed to provide a shield behind which wicked fraudfeasers may hide in order to exploit the gullibility of trusting victims, for the law seeks the opposite result.⁴⁹⁰ Instead, justifiability overlaps and serves as a useful check on other components of a fraud claim: whether the representation was factual, or merely opinion; whether it was material, or actually quite trivial; whether the plaintiff was ignorant of the falsity of the representation, or truly knew (or at least suspected) that it might be false; and, ultimately, whether the plaintiff in fact relied upon the representation in making a decision to buy or use the product.⁴⁹¹ Even in fraud cases, therefore, the justifiability requirement serves this important validation function of helping weed out claims where the plaintiff unfairly seeks to hold the defendant liable for harm caused principally by the plaintiff's bad judgement rather than any false statement the defendant may have made.⁴⁹²

In claims for merely negligent misrepresentation, the standard of conduct for the plaintiff reverts to the normal objective standard of reasonable behavior for a person exercising due regard for his or her own welfare.⁴⁹³ As for strict liability claims for misrepresentation, the case law is very sparse, but most courts would probably agree that the justifiability of a plaintiff's reliance upon a manufacturer's innocent misrepresentation "involves an objective standard" based upon whether a "reasonable consumer" could rely on the particular representations in dispute.⁴⁹⁴

490. See PROSSER & KEETON ON TORTS, *supra* note 50, § 108, at 751 (citations omitted): The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and security enable them to protect themselves, [and] no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.

Id.

491. See, e.g., *AMPAT/Midwest, Inc.*, 896 F.2d at 1042 ("The requirement of justifiable reliance backstops the jury's determination of actual reliance."). Justifiable reliance is conventionally used as an umbrella concept that includes the elements of materiality and fact. See RESTATEMENT (SECOND) OF TORTS § 538 cmt. b; PROSSER & KEETON ON TORTS, *supra* note 50, §§ 108, 109. See generally DOBBS, *supra* note 314, § 474, at 1360-61.

492. See 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 8, § 3:2, at 90.

493. See, e.g., *Mainline Tractor & Equip. Co. v. Nutrite Corp.*, 937 F. Supp. 1095, 1105 (D. Vt. 1996) (applying Vermont law and holding justifiability of reliance based on objective standard); RESTATEMENT (SECOND) OF TORTS § 552A cmt. b (stating that "[t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying," but noting that comparative fault may be applicable to claims involving physical harm).

494. *Gawloski v. Miller Brewing Co.*, 644 N.E.2d 731, 736 (Ohio Ct. App. 1994) (holding that any reliance on commercials not justifiable as a matter of law when prison inmates sued Miller for causing their alcoholism that led to lives of crime, on ground that commercials misrepresented Miller beer as "an enhancer of the quality of life"); see also *Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 223 (Colo. 1982) (4-3 decision) ("Justifiable reliance contemplates the reasonable exercise of knowledge and intelligence in assessing the represented facts. Unsupportable subjective reliance is inadequate.").

Comment *j* to *Restatement (Second) of Torts* § 402B (on justifiable reliance) provides scant assistance in discerning the standard for assessing justifiability in the strict liability context. However, comment *g* suggests an objective standard: "[T]he fact misrepresented must be a material one, of importance to the normal purchaser, by which the ultimate buyer may justifiably be expected to be influenced in buying the chattel."

C. Contributory and Comparative Negligence, Assumption of Risk, and Misuse

If a plaintiff is justified in relying upon a tortious misrepresentation, there may well be no room for the conventional misconduct defenses to operate. To put the matter another way, the defenses of contributory negligence, assumption of risk, and misuse all logically appear to be absorbed into the requirement that a plaintiff establish the justifiability of his or her reliance upon the defendant's representation.

An example may help to illustrate this point. Assume that a plaintiff purchases a "Golfing Gizmo," a golfers' training device consisting of two metal pegs, two cords (one cotton and one elastic), and a golf ball attached to the cotton cord.⁴⁹⁵ The purpose of the device, described by the manufacturer as "completely safe—ball will not hit player," is to return the ball to the golfer, via the elastic cord, after it is hit. If the player sets up the Gizmo device ten feet in front of a brick wall and squarely hits the ball against the wall, the ball might well bounce back and hit the golfer in the head. Using the Gizmo in such an obviously dangerous manner is clearly unreasonable, hence contributorily negligent, and the golfer would appear quite plainly to have assumed the risk. Similarly, if the golfer were to strike the ball with a sledge hammer rather than a golf club, shattering the ball which injured his eye, or if the golfer were injured in a fall when the cord broke as he used it to climb a tree, such unforeseeable misuse should bar recovery. But in each of these situations, the golfer's injuries could not conceivably be said to result from a justifiable reliance on the manufacturer's safety representation.⁴⁹⁶ In short, the justifiable reliance element of tortious misrepresentation claims appears to embrace and so supplant the traditional forms of user misconduct defense.

Over centuries of fraud cases, the courts developed a substantial body of doctrine concerning the misconduct of the representee, largely in cases involving pecuniary loss and mostly involving the effect of a plaintiff's contributory negligence. Although many decisions have required plaintiffs engaged in business transactions to maintain a reasonable vigilance for their own protection, even from fraudulent misrepresentation,⁴⁹⁷ the cases widely hold that "contributory negligence" as such is no defense to fraud.⁴⁹⁸ The rule

495. This was the product in fact involved in *Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975), an early, prominent case decided under § 402B of the *Restatement (Second) of Torts*.

496. See Sales, *supra* note 461, at 271. It would also appear to fail on falsity, in that a fair interpretation of the safety representation includes an implicit limitation that the Gizmos be used in a manner that is not patently dangerous.

497. See, e.g., *Cheney Bros. v. Batesville Casket Co.*, 47 F.3d 111, 115 (4th Cir. 1995) (applying South Carolina law and noting the established "duty on the part of the representee to use some measure of protection and precaution to safeguard his interest" (quoting *Thomas v. Am. Workmen*, 197 S.C. 178, 182, 14 S.E.2d 886, 887-88 (S.C. 1941))).

498. "That a more cautious buyer might not have relied, might have smelled a rat, does not defeat liability. There is no defense of contributory negligence to an intentional tort, including fraud." *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1041 (7th Cir. 1990) (applying Illinois law) (Posner, J.). See generally *RESTATEMENT (SECOND) OF TORTS* § 545A. Although § 545A by its terms applies to recovery for pecuniary loss, it is incorporated by reference into the Restatement's fraud section governing liability for physical harm. See *RESTATEMENT (SECOND) OF TORTS* § 557A cmt. a; 37 AM JUR 2D *Fraud & Deceit* § 247, at 329 (1968) (noting the conflicting policies of suppressing fraud, on the one hand, while not encouraging the neglect of one's own interests, on the other, and observing that the law has

is said to be different for claims of negligent misrepresentation, where contributory negligence is conventionally said to bar the claim.⁴⁹⁹ Yet, here as well, these cases have mostly involved business transactions involving pecuniary loss,⁵⁰⁰ and there is little case law on whether the contributory negligence defense is applicable to products liability misrepresentation cases involving physical harm.

For claims of strict products liability for misrepresentation, as set forth in Section 402B of the *Second Restatement* and Section 9 of the *Third Restatement*, the effect of a plaintiff's contributory negligence is unclear. Comment *j* to Section 402B, which explicitly addresses justifiable reliance, provides scant assistance in discerning the meaning of justifiability in the strict liability context; it merely mentions that justifiability is a requirement and references the *Second Restatement* sections on justifiable reliance for fraud, "so far as they are pertinent," including the provision that contributory negligence does not bar liability.⁵⁰¹ There is little value in such dated, offhand treatment of important doctrine, and the *Third Restatement* addresses the issue even less.⁵⁰² While some isolated case law involving strict liability claims suggests that contributory negligence should not serve as a defense, the authority is old and not entirely on point.⁵⁰³ Thus, whether a plaintiff's contributory negligence should play some role in strict products liability claims for tortious misrepresentation, or whether contributory negligence is exclusively absorbed into the issue of the justifiability of the plaintiff's reliance, remains a problem to be solved. Surely the most appropriate resolution of this issue, as discussed above, is to view contributory negligence, in all forms of tortious misrepresentation cases, as merged entirely into the justifiability of reliance.

But contributory negligence has been resurrected in recent years in the guise of comparative fault, and so some courts may feel obligated to consider whether and, if so, how the comparative fault doctrine may affect claims for tortious misrepresentation. This issue has received little consideration from either courts or commentators.⁵⁰⁴ In cases involving intentional misrepresentation, the comparative fault doctrine is widely viewed to be

opted to protect not only the vigilant but also the gullible "against the machinations of the designedly wicked").

499. See RESTATEMENT (SECOND) OF TORTS § 552A (1977).

500. See *id.* The principal Restatement section on negligent misrepresentation involving risk of physical harm, § 311, addresses the plaintiff misconduct issue only in terms of the reasonableness of the plaintiff's reliance. See *id.* § 311 cmt. c.

501. RESTATEMENT (SECOND) OF TORTS § 545A (1977).

502. In short, because of the brevity of explicit discussion of justifiability in either Section 402B of the *Second Restatement* or Section 9 of the *Third Restatement*, neither Restatement provides a basis for determining whether, in addition to the justifiable reliance element, the doctrine of strict products liability in tort for misrepresentation may be barred, or damages reduced, on the ground of a plaintiff's contributory negligence.

503. See PROSSER & KEETON ON TORTS, *supra* note 50, § 108, at 750 n.10.

504. The commentary includes a couple of suggestions that comparative fault principles might be applied to negligent misrepresentation claims. See DOBBS, *supra* note 314, at 1359-60; RESTATEMENT (SECOND) OF TORTS § 552A cmt. b (1977). *Contra* Massey, *supra* note 461, at 190. But such observations probably spring from a desire to reduce the harshness of contributory negligence serving as a total bar, rather than to provide misrepresenters a second bite at the misconduct apple.

inapplicable⁵⁰⁵ for the same reasons of fairness and policy that properly preclude the use of contributory negligence as a bar to fraud recovery discussed above. In negligent misrepresentation cases involving pecuniary loss outside the realm of products liability, the few cases are split, but the better view appears to be that comparative fault should not apply here either.⁵⁰⁶ No case has been found applying comparative fault to cases involving strict products liability for misrepresentation under Section 402B of the *Second Restatement* or its *Third Restatement* counterpart. Surely comparative fault is inappropriate for strict liability claims where the very idea of a buyer's negligence in relying justifiably upon a manufacturer's product safety representations is a concept that is difficult to grasp.

Because a plaintiff must prove the justifiability of his or her reliance for any tortious misrepresentation claim, the traditional products liability misconduct defenses are simply out of place. Of the few decisions that have addressed this issue, the better reasoned ones have exhibited little tolerance for attempts by defense lawyers to get two bites at the misconduct apple by arguing, first, that the plaintiff's reliance upon the representation was unjustified, and, second, that, even if the reliance in fact was justified, the plaintiff was negligent, assumed the risk, or misused the product.⁵⁰⁷ These decisions persuasively conclude that the justifiability (or reasonableness) of a plaintiff's reliance encompasses all forms of plaintiff misconduct addressed by the traditional misconduct defenses.⁵⁰⁸ If a statute does not compel a contrary result,⁵⁰⁹ little would be lost except confusion if the courts would clearly hold that none of the traditional misconduct defenses apply to common law tortious misrepresentation claims in products liability litigation.

505. *WOODS & DEERE*, *supra* note 5, § 14:51, at 396 ("It is probably safe to say that comparative negligence will not apply in deceit cases except in the 'comparative fault' jurisdictions of Arkansas, Maine, and New York."). See generally Allan L. Schwartz, Annotation, *Applicability of Comparative Negligence Principles To Intentional Torts*, 18 A.L.R. 5th 525 (1994) (discussing applicability of comparative negligence to intentional tort actions).

506. See, e.g., *Estate of Braswell v. People's Credit Union*, 602 A.2d 510, 515 (R.I. 1992); *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1566 (7th Cir. 1987) (applying Illinois law); *Condor Enter., Inc. v. Boise Cascade Corp.*, 856 P.2d 713, 716 (Wash. Ct. App. 1993). See generally Sonja Larsen, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation*, 22 A.L.R. 5th 464 (1994) (discussing applicability of comparative negligence to negligent misrepresentation actions).

507. See, e.g., *Klages v. General Ordnance Equip. Corp.*, 367 A.2d 304, 313 (Pa. Super. Ct. 1976) ("[T]he lower court fully charged the jury regarding justifiable reliance, and that instruction encompassed appellant's claim of assumption of the risk . . ."); *Schwabe v. Porter*, 92-1250-FT, 1993 WL 48173, *2 (Wis. Ct. App. Feb. 16, 1993) (holding that a plaintiff's recovery cannot be reduced according to plaintiff's comparative fault).

508. Not all courts or commentators entirely agree. See *Nugent v. Utica Cutlery Co.*, 636 S.W.2d 805, 809-10 (Tex. App. 1982) (allowing misuse defense in defense of § 402B claim); *Daye v. General Motors Corp.*, 720 So. 2d 654, 660 (La. 1998) (holding that sole cause of accident was driver's negligent driving, not defendant's advertising). See generally *Sales*, *supra* note 461, at 269-77 (acknowledging that the justifiability of reliance requirement fully embraces the assumption of risk defense, but arguing that misuse and comparative fault should be allowed as independent defenses); *Massey*, *supra* note 461, at 190 (arguing that assumption of risk and contributory and comparative negligence should not be defenses, but misuse should).

509. At least one state, Connecticut, has a products liability statute (1) providing that misrepresentation is a products liability claim, and (2) specifying misconduct defenses that apply generally to such claims. CONN. GEN. STAT. §§ 52-572I, m(b), & o (West 1991 & Supp. 2000).

VII. CONCLUSION

In using products, consumers must exercise a variety of choices and physical skills. The human brain is quite imperfect, and consumers frequently are distracted, uninformed, clumsy, hasty, or adventurous when putting their products to use. If a consumer's choices or skills in using a product are faulty in some respect, a product accident may result.

Product accidents normally do not give rise to products liability claims because most such accidents result solely from the consumer's faulty judgment or behavior.⁵¹⁰ But accidents sometimes are caused at least in part because a product is defective or because a consumer relies upon a supplier's false assertion about a product's safety or performance. When product accidents do result from some combination of product defect (or false assertion) and a consumer's faulty conduct, one or more user misconduct defenses normally serve to bar recovery or reduce the user's damages. As examined throughout this Article, the products liability law on user misconduct defenses is extensive and in some respects complex. Because consumer misbehavior in some form often figures prominently in products liability litigation, a thorough understanding of the user misconduct defenses is essential to lawyers handling such cases.

510. See *supra* note 2 and accompanying text.